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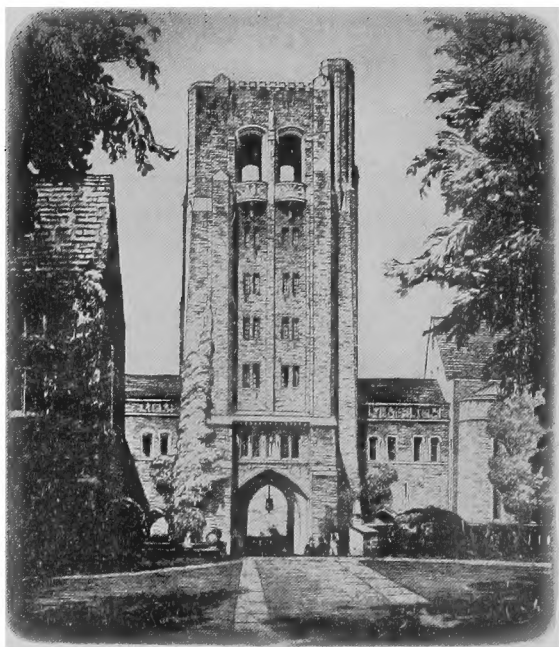
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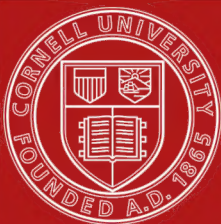
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A TREATISE  
ON THE  
SPECIFIC PERFORMANCE OF CONTRACTS,  
AS IT IS ENFORCED BY  
COURTS OF EQUITABLE JURISDICTION,  
IN THE  
UNITED STATES OF AMERICA.

---

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TO THE  
HON. S. CLINTON HASTINGS,  
OF THE SAN FRANCISCO BAR,

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# PREFACE.

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THIS volume contains a large amount of matter derived from both English and American decisions. The object of the work is correctly described by its title. Its discussions are confined to those equitable doctrines which relate directly to the specific performance of contracts; the specific enforcement of trusts, either express or implied, does not come within the purpose and scope of the book. The author has endeavored to prepare a treatise suited to the needs of the American lawyer, and representing the equitable doctrines concerning specific performance as they have been established, and are administered by the American courts, partly from the simplicity of our real estate law, and partly from the habits, customs, and modes of dealing of our landed proprietors, there has grown up in this country a system of doctrines and rules relating to the specific enforcement of contracts quite different in many important respects from that which exists in England, and which is recognized by the English courts and text-writers. A treatise which should present and illustrate this American system, and which should describe all those features which distinguish it from the English, seemed to be needed; and such a book the author has endeavored to write. While no claim is made that all the cases in the reports have been cited, it is believed that cases of authority are cited bearing upon, and sustaining, every principle, doctrine, and rule which belongs to the general subject of specific performance, and which has received a judicial sanction. Every particular instance, in which a contract has been specifically enforced may not have been mentioned, but the principles are stated and explained to which every instance may be referred, and by which it must be determined. Much labor and care have been given to the preparation of the notes, which contain a very full commentary on an illustration of the text, and furnish numerous statements of decided cases and quotations from judicial opinions, which the author trusts will be found convenient to those members of the profession who do not have ready access to extensive libraries.

JOHN NORTON POMEROY.





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# SPECIFIC PERFORMANCE OF CONTRACTS.

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## INTRODUCTORY CHAPTER.

SECTION 1. The Specific Performance of Contracts is purely a remedy administered by courts having equitable jurisdiction, and the right to it, held and enforced by a contracting party, is purely a remedial right. All the private rights and duties comprised in the municipal law—except in that very small portion which simply defines the status of persons—are separated, from their intrinsic nature, into two generic classes, primary and remedial—or, to use the somewhat fanciful nomenclature of Bentham and his school, substantive and adjective. Primary rights and duties flow from the commands or rules which constitute the great body of the private law; they are the objects and ends for which the law itself is established; they apply to and regulate all the normal relations of the individual with his fellows; they do not result from any delicts or violations of the law, but exist prior to and wholly independent of all such wrongful acts or omissions. If obedience to the law were absolutely perfect, these primary rights and duties are the only ones with which jurisprudence would be practically concerned. Disobedience, however, is possible and constant; primary rights are violated and primary duties unperformed. Hence there arises the second grand division of remedial rights and duties, which spring immediately and exclusively from those acts and omissions which are violations of primary rights and duties, that is, from delicts, wrongs, or offenses. A remedial right is, therefore, a right to obtain some remedy, conferred by the law upon the holder of a primary right which has been broken, and a remedial duty is the corresponding duty to grant or permit such remedy, devolving upon the wrong-doer, as the consequence of his delict.(1) In the English system of administering justice, which

(1) See Austen, *Lect. on Jurisp.* vol. 2, pp. 450–453 (Eng. ed. of 1863); Pomeroy on Remedies, §§ 1, 2.

prevails throughout the United States, all civil remedies and the corresponding remedial rights, except a very few special kinds, are separated into two divisions, respectively denominated the legal and the equitable, because during the integrity of the system, while its peculiar methods were kept unaltered, and before the sweeping reforms introduced by modern legislation, the one class were administered by the courts of law alone, and the other by the courts of equity. The change recently made in the very principles of the old procedure, which has consolidated the two courts into one tribunal, and which permits legal and equitable remedial rights to be enforced and legal and equitable remedies to be obtained in the same action, will doubtless tend to obliterate the line which has hitherto distinguished the two classes in our legal nomenclature, although all the individual remedies themselves will remain unaffected by the statutory modifications which relate solely to the means of obtaining them through judicial action.

SEC. 2. In every contract, however simple or however complicated, the primary right of the party who is to receive the benefit, is always a right to have the very thing done or omitted which the other party has promised to do or to omit—a right to the specific acts or forbearances for which the agreement stipulates; and the corresponding primary duty of the party on whom the obligation rests, is to do or to omit exactly what he has undertaken to do or to omit. In other words, the terms of the contract itself in every instance define the nature and extent of the primary rights and duties—varying beyond the possibility of description or enumeration—which result from it. If the contract is merely for the payment of a certain sum of money, the right is to receive such payment; if it is for the conveyance of a tract of land, the right is to obtain such conveyance; if it is for the erection of a house in a specified manner, the right is to have the house erected in that manner; if it is for prescribed personal services to be rendered by the other party, the right is to those very services as stipulated; and so on through the numberless forms in which persons may bind themselves by their agreements. When, however, the contract is broken, by the party upon whom the obligation of it rests, and the primary right, whatever it may be, of the other party is invaded, a remedial right at once accrues to him, and a remedial duty is imposed upon the former, both of which the law will enforce by means of a judicial proceeding. From the dual nature of the English law courts, from the highly technical and arbitrary forms of its actions and pleadings, and no doubt from a certain narrowness and

rigidity which pervaded the entire system itself, the common law gave and still gives but one kind of remedy, one species of remedial right and duty for the breach of all contracts. This single remedy is a sum of money paid by the wrong-doer; this single remedial right is the right to compel such payment; this single remedial duty is the duty to make such payment. If the contract consists, on the one side, simply of a promise or obligation to pay a definite sum of money—in other words, if it creates a debt—the remedial right of the creditor is identical with his primary right; and the remedy is in reality a specific performance. In all other possible contracts, the remedy is in the nature of damages given purely as a compensation, and the remedial right is plainly a substitute, or rather an equivalent, for the primary right which has been violated.(1) This legal remedial right is universal and absolute. Whenever a contract, valid and binding at law, has been broken, the right to recover either the debt or the compensatory damages in some amount, although perhaps only nominal, invariably arises, and will constitute a sufficient ground of action in a court of law.

SEC. 3. In the innumerable variety of relations incident to modern society, contracts will necessarily be made for whose breach this mere pecuniary payment would be an utterly inadequate and often impracticable relief; and a system of municipal law, which provided no other kind, would fail in maintaining and dispensing the justice which is the great object of all enlightened jurisprudence. As the law courts were either unable or unwilling to deviate from the methods which they had originally adopted, the court of chancery was compelled to supply the deficiency, and to administer the only remedy which is just and adequate and even practicable in many classes of violated agreements. Hence there arose at an early day the jurisdiction of chancery to enforce the equitable remedy of specific performance, as applied to contracts.(2) It consists in the contracting party's exact

(1) See language of V. C. STUART, in *Ord v. Johnston*, 1 Jur. N. S. 1063, 1064.

(2) The nature and object of this equitable remedy was summed up in one sentence by Ld. Chan. SELBORNE, in the recent case of *Wilson v. Northampton, etc. R'y Co.*, L. R. 9 Ch. 279, 284: "The principle which is material to be considered is, that the court gives specific performance instead of damages, only when it can by that means do more perfect and complete justice." The foundation and measure of the jurisdiction is the desire to do justice, which the legal remedy would fail to give. This justice is primarily due to the plaintiff, but not exclusively, for the equities of the defendant are also taken into consideration and protected. Specific performance is therefore a *conscious attempt on the part of the court to do complete justice to both the parties with respect to all the juridical relations growing out of the contract between them.*

fulfillment of the obligation which he has assumed—in his doing or omitting the very acts which he has undertaken to do or omit. The remedial right and duty are thus made identical with the primary right and duty, and the party is thereby deprived of the option, which the law practically gives him, to disregard the actual obligation by which he is bound, and to pay a sum of money in place thereof. While law and equity remained in their original condition, as two distinct and partially independent systems, the remedy of specific performance could only be obtained by means of a suit brought for that purpose in a court possessing the equity jurisdiction. Under the reformed procedure it may still be obtained by a party plaintiff in a similar manner; but it will also be granted to the defendant in a legal action who sets forth a proper case for the affirmative equitable relief in his answer or counterclaim.

SEC. 4. The right to this equitable remedy, however, is neither universal nor absolute. Specific performance has not supplanted the legal relief of compensation, nor has it been extended to all kinds of contracts. It is strictly an ancillary and supplementary remedy, and is confined to those classes of agreements for whose breach the mere payment of pecuniary damages is acknowledged to be either impracticable or inadequate. The reasons which first led the court of chancery to interfere and specifically enforce the terms of any contract, have been steadily kept in view by the tribunals of equitable jurisdiction in all their subsequent applications of the doctrine to new relations and under new circumstances, and have constantly guided and restrained them in the administration of this particular branch of their judicial functions. Furthermore, the right to the remedy of specific performance is not absolute, even within the species of contracts to which it has been confined. In the common but somewhat misleading language of the decided cases, it is said to be “discretionary.” The exact meaning of this term, or rather the conditions and limitations which it is intended to express, will be fully discussed and explained in the subsequent chapters; it is enough now to say that courts may be prevented or deterred from decreeing the specific performance of a valid and binding contract by circumstances and contingencies connected with its subject-matter, its terms, or the relations of its parties with each other, or with third persons, which would not constitute the slightest obstacle or objection to the recovery of a judgment for damages in courts of law. In the absence, however, of any of these circumstances or contingencies, it may be said to be as much a matter of course for courts of equity to specifically enforce

certain varieties of agreements—especially those for the sale of lands—as for these courts to grant any other relief within the range of their jurisdiction. The two propositions which have been thus stated in a general manner, that specific performance is not universal, but is an equitable remedy ancillary and supplementary to the legal relief of damages, and that it is not legally absolute but discretionary to the extent of being controlled by equitable considerations, are fundamental; from them are derived, more or less directly, nearly all the subordinate rules which make up the head of equity jurisdiction, to be discussed in the present work.

SEC. 5. The discussion of the principles and doctrines which I have thus briefly indicated, will be pursued in the following order: I. The nature, extent, and limitations of the remedial right to a specific performance of contracts. II. The nature, elements, and incidents of contracts, in order that they may be specifically enforced. III. Acts or omissions of the parties, and other facts, done or occurring subsequently to the conclusion of the contract, which affect the right to a specific performance. IV. Rules of procedure, which are peculiar to the suit for a specific performance, and special statutory provisions of the various states, either regulating the general jurisdiction or prescribing summary proceedings in certain cases.

## CHAPTER I.

GENERAL NATURE, EXTENT AND LIMITATIONS OF THE RIGHT TO A  
SPECIFIC PERFORMANCE OF CONTRACTS.

## SECTION I.

*Is an ancillary and supplementary equitable remedy.*

SEC. 6. All contracts may be reduced to three forms. *First.* Where there is simply a promise to pay money on one side in consideration of a similar payment or promise to pay on the other. *Second.* Where there is a promise to do or to omit some act or acts on one side, in consideration simply of a promise to pay or a payment of money on the other; and *Third.* Where there is a promise to do or to omit some act or acts on one side, in consideration of the doing or the undertaking to do certain acts, which may, perhaps, include a money payment on the other. It is very plain that in all contracts falling within the first class, which only call for a pecuniary payment from either party, the legal remedy of a money judgment will always be possible and sufficient, and there will be no occasion for invoking the interposition of equity. Specific performance is confined to agreements of the two other classes. In those which form the second division, it might be supposed from the general principles heretofore stated, that only the party who is to receive the benefit of the acts or omissions promised by the other, could resort to equity and enforce their specific performance according to the terms of the undertaking, while the party who is to receive the benefit of the money payment would be left to his legal remedy—the recovery of a money judgment in a common-law action. This supposition, however logical it may appear, is prevented by a well established doctrine of equity, that the right to a specific performance, if it exists at all, is, and necessarily must be, mutual;—in other words, it is and must be held, and be capable of being enjoyed alike by both parties in every agreement to which the jurisdiction extends.(1) As a familiar example, in the simplest form

(1) This doctrine of mutuality will be fully discussed in subsequent sections. It is sufficient now to cite a few cases in which it is recognized and enforced. *Adderley v. Dixon*, 1 S. & S. 607; *Withy v. Cottle*, 1 S. & S. 174; *Kenney v. Wexham*, 6 Mad. 355, 357; *Cogent v. Gibson*, 33 Beav. 557; *Old Colony R. R. v. Evans*, 6 Gray, 25; *Cook v. Grant*, 16 S. & R. 198, 209; *Brown v. Hafl*, 5 Paige, 235; *Phillips v. Berger*, 8 Barb. 528; *Hamblin v. Dinneford*, 2 Edw. Ch. 531.



of contract for the sale of land, when the vendor agrees to convey, and the purchaser merely promises to pay a certain sum as the price, since the latter may, by a suit at equity, compel the execution and delivery of the deed, the former may also, by a similar suit, enforce the undertaking of the vendee, although the substantial part of his relief is the recovery of money.(1) On the same principle a person who has agreed to sell certain claims against a debtor,(2) or an annuity,(3) or a patent right,(4) may enforce the purchaser's promise to pay the price in equity, because the purchaser on his part can, by the same means, compel an assignment of the things in action agreed to be sold. It should be observed, however, that in these suits by the vendor, there is generally some other act to be done by the purchaser besides the simple payment of money, the performance of which may be enforced by the decree, and even in those cases when no such act has been undertaken by him in the contract, he may be compelled to accept the deed, or assignment or other subject-matter as well as to pay the price, so that the decree is not purely one for the recovery of money. In all the contracts composing the third class, there can be no doubt or difficulty; a specific performance is plainly possible in favor of either party against the other. The simplest illustration is an agreement to exchange certain lands made by the two proprietors.

SEC. 7. Different reasons for the exercise of the equitable jurisdiction have been given, in former times, by able judges. Thus, Lord HARDWICKE is reported to have said:(5) "In general this court will not entertain a bill for a specific performance of contracts of stock, corn, hops, etc.; for as these are contracts which relate to merchandise, which *vary according to different times and circumstances*, if a court of equity should admit such bills, it might drive on the parties to the execution of a contract to the ruin of one side, when upon an action (at law) that party might not have paid, perhaps, above a shilling damages. \* \* \* As to the cases of contracts for the purchase of lands

(1) *Old Colony R. R. v. Evans*, 6 Gray, 25; *Hopper v. Hopper*, 1 C. E. Green, 147; *Schroeppel v. Hopper*, 40 Barb. 425; *Springs v. Sanders*, Phill. Eq. (N. C.) 67; *Clifford v. Turrell*, 1 Y. & C. C. C. 138, 150; *Walker v. Eastern Counties R'y Co.*, 6 Ha. 594. But the contrary is held in Massachusetts under the statutory limitations upon the equity jurisdiction in that state. A vendor who has agreed to sell his land for a specified sum of money, cannot maintain a suit in equity for a specific performance, because, as it is said, he can recover the price in an action at law. *Jones v. Newhall*, 115 Mass. 244.

(2) *Adderley v. Dixon*, 1 S. & S. 607.

(3) *Withy v. Cottle*, 1 S. & S. 174; *Kenney v. Wexham*, 6 Mad. 355, 357.

(4) *Cogent v. Gibson*, 33 Beav. 557.

(5) *Buxton v. Lister*, 3 Atk. 384.

or things that relate to realties, those are of a permanent nature ; and if a person agrees to purchase them, it is on a particular liking to the land, and is quite a different thing from matters in the way of trade." If, as Lord HARDWICKE here says, the fluctuating value of certain commodities is the reason why contracts concerning them are not to be specifically enforced, it is plain that the same objection must also apply to contracts for the sale of land, in those cases where its market value is not permanent, or at least confined in its variation between any narrow limits.(1) The grounds of the jurisdiction have been more accurately and comprehensively stated by Sir JOHN LEACH,(2) as follows: "Courts of Equity decree the specific performance of contracts, not upon any distinction between reality and personalty, but because damages at law may not, *in the particular case*, afford a complete remedy. Thus a court of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of the land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a court of equity will not generally decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for ; inasmuch as with the damages he may purchase the same quantity of the like stock or goods."(3)

SEC. 8. The foregoing language of Sir JOHN LEACH is a very clear and correct statement of the doctrine in its most general terms, but is not exhaustive ; it gives no rules by which we may finally determine for all cases, where the legal relief of damages will be considered

(1) See remarks of RICHARDS, C.B., in *Wright v. Bell*, 5 Price, 328, 329. In this country, where the price of land is extremely fluctuating, the reasons of Lord HARDWICKE, would, if logically carried out, defeat the specific performance of most land contracts.

(2) *Adderly v. Dixon*, 1 S. & S. 610.

(3) See *Ord v. Johnston*, 1 Jur. N. S. 1063, 1064, per V. C. STUART. "The jurisdiction of specific performance is one which is always said to be discretionary in the court. It is a jurisdiction assumed by this court for the more perfect administration of justice, for giving to persons having a right under an agreement, the very specific thing according to the provisions of the agreement, and is intended to give more effectual relief in the case to which it applies—because according to proceedings of courts of law upon the breach of an agreement, what a court of law does is to give compensation in money which shall amount to an equivalent to that which the agreement had stipulated should be performed."

insufficient, so that a resort may be had to the equitable remedy. From a comparison of the authorities, ancient and modern, the cases of insufficiency of damages, which admit a recourse to equity for a specific enforcement of the contract, are reducible to two distinct classes—or, in other words, the insufficiency of damages as a remedy may be referred to two distinct grounds connected with the contract.

1. The first is where the subject-matter of the contract is of such a special nature, or of such a peculiar value, that the damages, when ascertained according to legal rules, would not be a just and reasonable substitute for or representation of that subject-matter in the hands of the party who is entitled to its benefit—or, in brief, where the damages are *inadequate*. 2. The second is where from some special and practical features or incidents of the contract inhering either in its subject-matter, in its terms, or in the relations of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty, so that no real compensation can be obtained by means of an action at law—or, in brief, where damages are *impracticable*. All the particular instances in which a specific performance is decreed may be referred to one or the other of these two causes, and it will not unfrequently happen that both are involved in the facts of one and the same case. I shall now proceed to illustrate these two propositions, and in this manner exhibit more clearly the ancillary and supplementary character of the remedy.

SEC. 9. *First. Inadequacy of the damages. Contracts concerning land.* The law in estimating the damages for the breach of any contract, bases them upon the general value of the subject-matter, its value to persons generally, and makes no account of any special value which it may have for the contracting party, or of any relations which may exist between it and him. If, therefore, he enters into the agreement from some motives of personal gratification, or with the design of making some particular use of the subject-matter, or for some special object which cannot be represented by money, it is plain that with respect to these features and incidents of the contract, the law does not assume to give him a remedy. His interests can only be satisfied by an actual fulfillment of the stipulations which have been made for his benefit; for example, by an actual conveyance of the land or chattel which he has purchased.(1) If money were in all

(1) *Harnitt v. Yielding*, 2 Sch. & Lef. 549, 553, 554; *Adderley v. Dixon*, 1 S. & S. 607; *Cud v. Rutter*, 1 P. Wms. 570, 571; *Hollis v. Edwards*, 1 Vern. 159; *Duff v. Fisher*, 15 Cal. 375; *McGarvey v. Hall*, 23 Cal. 140; *Kirksey v. Fike*, 27 Ala.

cases a measure of the injury done by the non-fulfillment of a contract, it is evident that an exact equivalent for the wrong might always be rendered by means of damages. But money is an exact equivalent only where by money the loss sustained through the breach can be fully restored. As in a contract for the purchase of merchandise, where there is nothing to impress a peculiar value upon the identical articles, the purchaser can, with the damages which he has recovered, go into the market and buy other goods of exactly the same quality, kind and amount, and so his loss is fully compensated. In many cases, however, the ability of money to purchase an exact equivalent does not exist. One landed estate, though of precisely the same market value as another, may be entirely different in every other circumstance that makes it an object of desire. The vendee in a land contract may recover back the purchase money which he has paid, and with the damages which he thus receives he may purchase another

383; *Neville v. Merchants Ins. Co.*, 19 Ohio, 452; *Barnes v. Barnes*, 65 N. C. 261; *Willard v. Tayloe*, 8 Wall. 557; *Richmond v. Dubuque*, etc. R. R., 33 Iowa, 422; *Somerby v. Buntin*, 118 Mass. 279; *Bogan v. Daughdrill*, 51 Ala. 312; *Blanchard v. Detroit*, etc. R. R., 31 Mich. 44. Among the contracts concerning land which are constantly enforced in equity by a decree of specific performance, are agreements to give or to renew a lease. *Furnival v. Crew*, 3 Atk. 83, 87; *Tritton v. Foote*, 2 Bro. Ch. 636; 2 Cox, 174; *Burke v. Smyth*, 3 Jon. & Lat. 193; *Moss v. Barton*, L. R. 1 Eq. 474; *Buckland v. Papillon*, L. R. 2 Ch. 67. But the agreement must be certain and complete. *Robinson v. Kettletas*, 4 Edw. Ch. 67; *Whitlock v. Duffield*, 1 Hoff. Ch. 110. For cases where the specific enforcement of such agreements has been refused for different reasons, see *Myers v. Forbes*, 24 Md. 598; *Gelston v. Sigmund*, 27 Md. 334; *McKibbin v. Brown*, 1 McCarter, 13; *Hopkins v. Gilman*, 22 Wisc. 476. In relation to the enforcement of contracts for mortgages, see *DePierres v. Thorn*, 4 Bosw. 266; *City, etc., Ins. Co. v. Olmsted*, 33 Conn. 476; *St. Paul Division v. Brown*, 11 Minn. 356; *McClintock v. Laing*, 22 Mich. 212; *Ashton v. Corrigan*, L. R. 13 Eq. 76; *Hermann v. Hodges*, L. R. 16 Eq. 18. If the party defendant is within the jurisdiction, so as to be reached by process, a court of equity will decree the specific performance of a contract concerning land situated in another country or state, since the decree is *in personam* and not *in rem*. *Earl of Athol v. Earl Derby*, 1 Ch. Cas. 221; *Toller v. Carteret*, 2 Vern. 495; *Penn v. Lord Baltimore*, 1 Ves. Sen. 444; *Portlarlington v. Soulbey*, 3 Myl. & K. 104; *Archer v. Preston*, 1 Eq. Cas. Abr. 133; 1 Vern. 77; *Massie v. Watts*, 6 Cranch, 148, 158; *Sutphen v. Fowler*, 9 Paige, 280; *Myres v. DeMier*, 4 Daly, 343; *DeKlyn v. Watkins*, 3 Sandf. Ch. 185; *Shattuck v. Cassidy*, 3 Edw. Ch. 152; *Mead v. Merritt*, 2 Paige, 402; *Pingree v. Coffin*, 12 Gray, 288; *Brown v. Desmond*, 100 Mass. 269; *Davis v. Parker*, 14 Allen, 94; *Guerrant v. Fowler*, 1 Hen. & Munf. 4. For certain limitations upon this doctrine, see *Morris v. Remington*, 1 Parsons Eq. 387; *Blount v. Blount*, 1 Hawks, 365; *Penn v. Hayward*, 14 Ohio St. 302; *Waterhouse v. Stansfield*, 9 Hare, 234. Specific performance may be decreed and title vested where the land is within the state, although the vendor is out of the jurisdiction. *Rourke v. McLaughlin*, 38 Cal. 196; *Matteson v. Scofield*, 27 Wisc. 671.

estate of equal market value, but then there may be numerous features and incidents connected with the former tract which induced him to purchase, which made it to him peculiarly desirable, but which were not taken into account in the estimate of his damages, and which cannot be found in any other land which he may buy with the money. It is evident that in this and similar cases there would be a failure of justice unless some other jurisdiction supplemented that of the common law, by compelling the defaulting party to do that which in conscience he is bound to do, namely, actually and specifically to perform his agreement.(1)

SEC. 10. The ancillary and supplementary nature of the remedy is well illustrated by the rules which have been established in relation to the specific enforcement of contracts concerning real and personal property, especially those which provide for the sale, assignment, or transfer of property. It is well settled, as appears by citations already made,(2) that the different modes of treating the two kinds of contracts does not result from any different qualities inherent in the very nature of land and chattels, which make it possible to enforce the one and not the other, but from matters which are entirely incidental and collateral to the subject-matter. When, therefore, these incidental circumstances are found in connection with a contract relating to chattels, it would be specifically enforced by equity, as though it related to land. Where land, or any estate therein, is the subject-matter of the agreement, the equitable jurisdiction is firmly established. Whenever a contract concerning real property is in its nature and incidents entirely unobjectionable—that is, when it possesses none of those features which, as we shall see, appeal to the discretion of the court—it is as much a matter of course for a court of equity to decree a specific performance of it, as it is for a court of law to give damages for the breach of it.(3) The reasons which have led the

(1) The foundation of the jurisdiction to decree the specific performance of contracts, is simply this, that an award of damages at law will not give a party the compensation to which he is entitled; that is, will not put him in a situation as beneficial to him as if the agreement were specifically performed. *Harnett v. Yeilding*, 2 Sch. & Lef. 553; *Phillips v. Berger*, 2 Barb. 608; 8 id. 527; *Phyfe v. Wardell*, 2 Edw. Ch. 47; *Stuyvesant v. Mayor, etc.*, 11 Paige, 414; *Nevitt v. Gillespie*, 1 How. Miss. 108; *Barnes v. Barnes*, 65 N. C. 261; *Willard v. Tayloe*, 8 Wall. 557; *Richmond v. Dubuque, etc.* R. R., 33 Iowa, 422; *Somerby v. Buntin*, 118 Mass. 279; *Bogan v. Daughdrill*, 51 Ala. 312; *Blanchard v. Detroit, etc.* R. R., 31 Mich. 44; *Duff v. Fisher*, 15 Cal. 375; *McGarvey v. Hall*, 23 Cal. 141; *Schroeppel v. Hopper*, 40 Barb. 425.

(2) See *Adderley v. Dixon*, 1 S. & S. 610, per Sir JOHN LEACH, V. C.

(3) *Hall v. Warren*, 9 Ves. 608; *Old Colony R. R. v. Evans*, 6 Gray, 36; *Story's Eq. Jur.* § 751. What agreement creates a charge upon one's land in favor of

courts to hold that damages are an inadequate compensation for the breach of contracts concerning land have already been stated. Undoubtedly there are cases where the reasons have no actual application and force. Land is often, especially in this country, bought and held simply as merchandise, for mere purposes of pecuniary profit, possessing no interest in the eyes of the purchaser and owner other than its market value. The jurisdiction, however, extends to these cases. The rule having been once established, is now universal. The actual motives and design of the purchaser are never enquired into, for it is assumed in every instance that damages are an inadequate relief for the breach of a land contract.

SEC. 11. *Contracts concerning chattels.* The doctrine is equally well settled that, in general, a court of equitable jurisdiction will not decree the specific performance of contracts relating to chattels, because there is not any specific quality in the individual articles which gives them a special value to the contracting party, and their money value recovered as damages will enable him to purchase others in the market of like kind and quality. To this may be added the fact that the law itself gives a remedy by which the possession of a specific

another, which will be enforced by a specific performance, see *Johnson v. Johnson*, 40 Md. 189. A county may enforce a dedication of land made to it, by a suit and decree of specific performance. *Reese v. Lee Co.*, 49 Miss. 639. The following are instances of various agreements concerning land which have been specifically enforced, *Bleakley's Appeal*, 66 Pa. St. 187; *Seichrist's Appeal*, ib. 237; *Wynn v. Smith*, 40 Geo. 457; *Porter v. Allen*, 54 Geo. 623; *Yoakum v. Yoakum*, 77 Ill. 85; *Page Co. v. American, etc. Co.*, 41 Iowa, 115; *Riddle v. Cameron*, 50 Ala. 263; *Rawlins v. Shropshire*, 45 Geo. 182; *Brown v. Crane*, 47 Geo. 483; *Chicago, etc. R. R. v. Nichols*, 57 Ill. 464; *Snyder v. Spaulding*, ib. 480; *Law v. Henry*, 39 Ind. 414; *Warren v. Ewing*, 34 Iowa, 168; *McNamee v. Withers*, 37 Md. 171; *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400; *Chartier v. Marshall*, 51 N. H. 400; *Green v. Richards*, 23 N. J. Eq. 32, 536; *McDavit v. Pierrepoint*, ib. 42; *Frey v. Boylan*, ib. 90; *Pinner v. Sharp*, ib. 274; *Colgate v. Colgate*, ib. 372; *Millard v. Merwin*, ib. 419; *McClaskey v. Mayor, etc.*, 64 Barb. 310; *Grier v. Rhyne*, 69 N. C. 347; *Rogers v. Williams*, 8 Phila. 123; *Wright v. Pucket*, 22 Gratt. 370; *Ambrose v. Keller*, 22 Gratt. 769; *Estes v. Furlong*, 59 Ill. 298; *Hamilton v. Rook*, 62 Ill. 139; *Au Gres Boom Co. v. Whitney*, 26 Mich. 42; *Warren v. Daniels*, 72 Ill. 272; *Kuhn v. Freeman*, 15 Kans. 423; *Reynolds v. O'Neil*, 26 N. J. Eq. 223; *Williams v. McGuire*, 60 Mo. 254. An agreement to give a lease will be enforced in behalf of the intended lessee. See *Clark v. Clark*, 49 Cal. 586. And in Texas an agreement to convey a "locative interest" will be enforced in favor of the heirs of the "locator." *Bell v. Warren*, 39 Tex. 106. For instances of the specific enforcement of family settlements, see *Wistar's Appeal*, 80 Pa. St. 484; *Henry v. Henry*, 27 Ohio St. 121; and of trusts, see *Chapman v. Wilbur*, 4 Oreg. 362; *Dodge v. Wellman*, 1 Abb. App. Dec. 512; *Estate of Webb*, 49 Cal. 542. A bond to convey land will be specifically enforced against the obligor. See *Ewins v. Gordon*, 49 N. H. 444.

chattel may, under ordinary circumstances, be recovered by the proprietor.(1) It should be borne in mind, however, that no distinction

(1) *Cud v. Rutter*, 1 P. Wms. 570; 2 Eq. Cas. Abr. 18 pl. 8; *Nutbrown v. Thornton*, 10 Ves. 161, per Lord ELDON; *Adderley v. Dixon*, 1 S. & S. 610, per Sir JOHN LEACH; *Buxton v. Lister*, 3 Atk. 384, per Lord HARDWICKE; *Cappur v. Harris*, Bumb. 135, per GILBERT, B.; *Caldwell v. Myers*, Hardin, 551; *Madison v. Chinn*, 3 J. J. Marsh. 230; *Dalzell v. Crawford*, 2 Pa. L. J. 17, 19; *Ins. Co. of N. A. v. Union Canal Co.*, 2 Pa. L. J. 65, 67; *Savery v. Spence*, 13 Ala. 561; *Bubier v. Bubier*, 24 Me. 42; *The Justices v. Croft*, 18 Geo. 473; *Roundtree v. McLain*, 1 Hemp. 245; *Waters v. Howard*, 1 Md. Ch. 112; *Hoy v. Hansborough*, 1 Freem. Ch. 533, 543; *Cowles v. Whitman*, 10 Conn. 121, 124; *Brown v. Gilliland*, 3 Dessau. 539, 541; *Gram v. Stebbins*, 6 Paige, 124; *Austin v. Gillaspie*, 1 Jones Eq. 261; *Ashe v. Johnson*, 2 Jones Eq. 149; *Ferguson v. Paschall*, 11 Mo. 267; *Phillips v. Berger*, 2 Barb. 609; 8 id. 527; *Scott v. Billgerry*, 49 Miss. 119; *McLaughlin v. Piatti*, 27 Cal. 451; but, see *Yulee v. Canova*, 11 Flor. 9. In *Phillips v. Berger*, 2 Barb. 609, the doctrine, as stated in the text, was admitted but was sharply criticised as founded upon reasons which had ceased to be of any real force, per EDMUNDS, J. The jurisdiction of this court in compelling a specific performance of contracts relating to lands, is pretty well settled; but not so in regard to personal contracts—that is, contracts for personal acts, or for the sale and delivery of personal property. The reason for the distinction between the two classes of contracts has long since passed away. Yet the distinction still in a great measure remains. Judge STORY, with great propriety, in his Commentaries on Equity Jurisprudence, remarks, that there is no reasonable objection to allowing the party who is injured by the breach to have an election either to take damages at law, or to have a specific performance in equity. The courts have not yet gone that length; but when they do they will relieve the subject of specific performance of many of its embarrassments, and remove from this branch of equity jurisprudence many of the artificial distinctions to which the courts have been compelled to have recourse, in order to justify their advance towards such a sound, general rule. The rule in regard to personal contracts yet falls short of that, and is extended only to cases where the party wants the thing in specie and he cannot otherwise be compensated; that is, where an award of damages would not put him in a situation as beneficial as if the agreement was specifically performed; or when the compensation in damages would fall short of the redress which his situation might require. The general rule is, not to entertain jurisdiction to decree a specific performance respecting goods, chattels, stocks, *choses in action*, and other things of a mere personal nature; but the rule is qualified, and is limited to cases where a compensation in damages would furnish a complete and satisfactory remedy. In *Cowles v. Whitman*, 10 Conn. 121, 124, DAGGETT, C. J., said: “It is contended that a bill will not lie for the specific execution of a contract relating to personal chattels merely, because there is an adequate remedy at law, and for this position several cases are cited and many more might be cited. As a general rule it is true. As contracts for the delivery of corn, flour, stock in banks, or in the funds, and the like, may be compensated in damages, courts of equity will leave the parties to their remedy at law. There can be no difference between these few shares of bank stock and any other like number.” In *Hoy v. Hansborough*, 1 Freem. Ch. 533, 543, it was said: “It is a general rule that a court of equity will not decree a specific performance of a mere personal covenant sounding in damages, nor of a contract relating to personality, where compensation may be had at law.”

inheres in the different nature of land and chattels. The fundamental principles which guide the court are the same whether the contract relates to realty or to personalty. In applying these principles, taking into account the discretionary nature of the jurisdiction, an agreement for the conveyance of land is *prima facie*, presumed to come within their operation, so as to be subject to a specific performance, but a contrary presumption exists in regard to agreements concerning chattels.(1) I shall now describe, in brief terms, for the purpose of further illustrating the ancillary nature of the remedy, the general classes of cases in which the equitable principle is applied to chattels in the same manner as to lands, and in which, therefore, the contracts relating to personal property will be specifically enforced.

SEC. 12. It is well settled that where chattels have some special peculiar value to their owner over and above any market value which could be placed upon them in accordance with strict legal rules, an interest which has happily been termed *pretium affectionis*, such as an heir-loom; and where the chattels are not individually of a common class, but are unique of their kind, and cannot be readily reproduced, so that others of a similar nature and equal value could not be procured by means of damages assessed according to legal rules, such as a painting, or other works of art; and where chattels are articles of unusual beauty, rarity and distinction, contracts concerning them will be specifically enforced in equity, and a delivery of them will be decreed, although they might be recovered in the common-law actions of detinue or replevin. The reasons of this rule are the utter inadequacy of any mere pecuniary compensation, and the incompleteness of the relief afforded by the legal actions in which the defendant might easily evade an actual delivery of the chattel itself.(2) It will

(1) See *Dalzell v. Crawford*, 1 Pars. Eq. 37, 42; *Mechanics' Bank v. Seton*, 1 Peters, 299; *Kirksey v. Fike*, 27 Ala. 383; *Summers v. Bean*, 13 Gratt. 404, 411.

(2) *Pusey v. Pusey*, 1 Vern. 273; *Duke of Somerset v. Cookson*, 3 P. Wms. 389; 2 Eq. Cas. Abr. 164, pl. 28; *Fells v. Read*, 3 Ves. 70; *Loyd v. Loaring*, 6 Ves. 773; *Nuthrown v. Thornton*, 10 Ves. 163, per *Ld. Eldon*; *Savill v. Tancred*, 1 Ves. Sen. 101; 3 Sw. 141, n.; *Walwyn v. Lee*, 9 Ves. 33; *Wood v. Rowcliffe*, 3 Hare, 304; 2 Ph. 382; *Lingen v. Simpson*, 1 S. & S. 600; *Lady Arundel v. Phipps*, 10 Ves. 139; *Lowther v. Lord Lowther*, 13 Ves. 95; *Pearne v. Lisle*, Amb. 77; *Falke v. Gray*, 4 Drew. 651; *Earl of Macclesfield v. Davis*, 3 V. & B. 16; *Clark v. Flint*, 22 Pick. 231; *Chamberlain v. Blue*, 6 Blackf. 491; *McGowan v. Remington*, 12 Pa. St. (2 Jones) 56. It may be instructive to follow the action of the courts through this line of cases and to notice the facts and grounds of their decisions. In *Pusey v. Pusey*, 1 Vern. 273, which is the leading case, the bill was that a horn, which time out of mind had gone along with the plaintiff's estate, and was delivered to his ancestors in ancient time to hold the land by, might be delivered to him. A demurrer to the bill was overruled by Lord Keeper GUILFORD. It



be seen from many of the cases cited in the foot note, that the equitable jurisdiction has not been confined to contracts; it is freely exercised to enforce the surrender and delivery of chattels *in specie*

will be noticed that in this and in several of the succeeding cases there was no contract, but the possession of the defendant seems to have been tortious. In *Duke of Somerset v. Cookson*, 3 P. Wms. 389, the plaintiff was entitled to an old silver patera bearing a Greek inscription and dedication to Hercules, which had been dug upon his estate. It had come into defendant's possession, and the duke brought a bill in equity to compel its delivery in specie *undefaced*. The defendant demurred on the ground that the remedy was at law, but the demurrer was overruled by Ld. Ch. TALBOT. *Fells v. Reed*, 3 Ves. 70, 71, was brought to recover a tobacco box of a remarkable kind, which had belonged to a club. In this case Ld. Ch. LOUGHBOROUGH stated the reason of the equitable remedy as follows: "The Pusey horn, the patera of the Duke of Somerset, were things of that sort of value that a jury might not give two-pence beyond the weight. It was not to be cast to the estimation of people who had not those feelings. In all cases where the object of the suit is not liable to a compensation by damages, it would be strange if the law of this country did not afford any remedy. It would be great injustice if an individual cannot have his property without being liable to the estimate of people who have not his feelings upon it." Lord ELDON in *Nutbrown v. Thornton*, 10 Ves. 163, speaking of the Pusey horn case said: "It turned upon the *pretium affectionis*, independent of the circumstance as to tenure, which could not be estimated in damages." In *Pearne v. Lisle*, Amb. 77, a finely carved cherry stone was recovered; and in *Lloyd v. Loaring*, 6 Ves. 773, certain masonic dresses and regalia. In *Savill v. Tancred*, 1 Ves. Sen. 101, the subject ordered to be delivered up was a strong box containing jewels; in *Lady Arundell v. Phipps*, 10 Ves. 139, ancient family pictures; in *Lowther v. Lord Lowther*, 13 Ves. 95, title deeds and valuable paintings; and in *Earl of Macclesfield v. Davis*, 3 V. & B. 16, an iron chest containing heir-looms. KINDERSLEY, V. C., in *Falcke v. Gray*, 4 Drew. 651, decided that a contract for the purchase of articles of unusual beauty, rarity and distinction, such as objects of *vertu*, will be enforced, since damages could not be an adequate compensation for non-performance. The opinion of BELL, J., in *McGowan v. Remington*, 12 Pa. St. (2 Jones) 56, is so able, clear, and full a discussion of the doctrine and of its reasons, that I shall quote from it at some length. The suit was in equity to compel the restitution of maps, plans and surveys prepared and used by the complainant in his business as a surveyor, together with his instruments, and office furniture, all of which had been left in the possession and custody of the defendant, his clerk, while he was absent on business, under an arrangement for their surrender when the complainant should return and resume his business. The defendant refused to deliver them under an unfounded claim that they had been sold or given to him. It should be noticed that these facts present a point which will be described in a subsequent section, viz.: the effect of a trust or fiduciary relation imposed upon the defendant concerning the chattels. A portion of the opinion is devoted to the consideration of that topic, but all its material passages will be quoted now to prevent a repetition. After disposing of the defendant's claim that they had been a gift or sale, the judge proceeds: "The contest is reduced to two questions: *First*. Whether the bill presents sufficient grounds to warrant the interference of a court of equity? *Secondly*. Whether that portion of the decree which covers the surveying instruments and furniture can be sustained? As to the

which have been tortiously obtained, or are wrongfully detained; but the precise ground of the equitable relief in such cases is the same as that upon which the specific performance of agreements is enforced,

first point the defendant insists that the only remedy is at law. Though the action of replevin is with us a broader remedy than in England, lying in all cases where one man improperly detains the goods of another, it is in no instance effective to enforce a specific return of chattels, since a claim of property and bond given is always sufficient to defeat reclamation, no matter what may be the final issue of the contest. As, therefore, our common-law tribunals are as powerless for such a purpose as the similar English courts, the propriety of exerting the equitable jurisdiction now invoked, must depend with us upon the same reasons that are deemed sufficient to call it into action there. Here as there, the enquiry must be, whether the law affords adequate redress by a compensation in damages, when the complaints of the detention of personal chattels. If not, the aid of a court of chancery will always be extended to remedy the injury, by decreeing a return of the thing itself. The precise ground of this jurisdiction is said to be the same as that upon which the specific performance of an agreement is enforced, namely, the fruition of the thing, the subject-matter of the agreement, is the object, the failure of which would be but ill supplied by an award of damages. *Lowther v. Lowther*, 13 Ves. 95. In the application of this rule some difficulty has been experienced. The examples afforded by the English books are usually those cases where, from the nature of the thing sought after, its antiquity, or because of some peculiarity connected with it, it cannot easily or at all be replaced." He here refers to several of the cases heretofore cited in the note, and proceeds: "Such articles as these are commonly esteemed not altogether, or perhaps at all, for their intrinsic value, but as being objects of attachment or curiosity, and therefore not to be measured in damages by a jury who cannot enter into the feelings of the owner; so, too, the impossibility, or even great difficulty of supplying their loss, may put damages out of the question as a medium of redress. But these are not the exclusive reasons why chancery interferes, for there may be cases where the thing sought to be recovered is susceptible of reproduction or substitution, and yet where damages could not be so estimated as to cover present loss or compensate its future consequent inconvenience. And I take it this is always so where, from the nature of the subject-matter or the immediate object of the parties, no convenient measure of damages can be ascertained; or, where nothing could answer the justice of the case but the performance of a contract in specie." The judge here quotes a series of English cases—which will be noticed in the text of a subsequent section—and describes the various contracts which were enforced therein, and adds: "By what standard would you measure the injury the plaintiff may sustain *in future* from being deprived, even for a brief period, of the use of papers essential to the prosecution of his business? Their intrinsic value might, perhaps, be ascertained by an estimate of the labor necessary to their reproduction, admitting the means to be at hand, and within the power of the plaintiff. But how could a tribunal ascertain the probable loss which in the meantime might be sustained? The present pecuniary injury might be little or nothing, and so possibly of the future; or it might be very great, depending upon the unascertainable events of coming time, as these may be influenced by the misconduct of the defendant. These considerations show, I think, the case is not one for damages. Besides, as many of the maps, plans, surveys, and calculations are copies of private papers, we are by no means satisfied they could

so that the decisions based upon both conditions of fact are authorities for the common doctrine.(1) Equity, however, will not interfere to specifically enforce a contract concerning even such a special and unique chattel, or to compel its delivery, when its pecuniary value has already been fixed by the parties or can be readily ascertained, so that an adequate compensation in the form of debt or damages can be recovered in a legal action.(2)

be replaced at all, certainly not without permission of the owner—a risk to which the plaintiff ought not unnecessarily to be exposed. If to these reflections we add the fact that some of the documents are the original work of the plaintiff, of value as being predicated upon data possibly no longer accessible, a wrong is perpetrated which a chancellor ought not to hesitate in relieving. It is enough for this purpose that a perfect relief at law is not apparent. The thing to be guarded against is not the invasion of the defendant's rights, for he stands here absolutely without any, except the common interest every citizen has in preserving the proper line of distinction that divides the jurisdiction and limits of the several courts. What is to be avoided is an unnecessary trespass upon the province of the common-law tribunals, and this is to be tested by the simple query whether they offer a full remedy for the wrong complained of. But there is another ground upon which this proceeding may be sustained. In *Falls v. Reid* the snuff box was deposited with the defendant, as a member of the society, upon certain terms, to be redelivered upon the happening of certain events. Lord ROSSLYN held that, under these facts, the defendant was a depositary, on an express trust which, upon a common ground of equity, gave the plaintiff title to sue in that court; and in this he was supported by Lord ELDON in the subsequent case of *Nutbrown v. Thornton*. According to the proof in our case, the papers and documents claimed were left with defendant under the express understanding that they were to be redelivered whenever the plaintiff should see fit to resume the business of his then profession in this city. It is then the case of direct confidence violated—a spell sufficiently potent to call into vigorous activity the authority involved.” The court then held that it should decide the whole controversy in one suit, and include the furniture and instruments in the same decree with the maps, plans and surveys.

See, also, the following cases, based upon contracts concerning the sale or delivery of slaves, in which the doctrine as to the specific performance of agreements relating to personalty, was fully discussed: *Farley v. Farley*, 1 McCord. Ch. 506, 516; *Sarter v. Gordon*, 2 Hill Ch. 121; *Horry v. Glover*, 2 Hill Ch. 515, 525; *Young v. Burton*, 1 McMullan Eq. 256; *Bobo v. Grimke*, 1 McMullan Eq. 304, 310; *Fraser v. McClenaghan*, 2 Richardson Eq. 79, 84; *Ellis v. Commander*, 1 Strobb. Eq. 188, 190; *Bryan v. Robert*, 1 Strobb. 335, 341; *Savery v. Spence*, 13 Ala. 561, 564; *Murphy v. Clark*, 1 Sm. & Marsh. 221, 232; *Butler v. Hicks*, 11 Sm. & Mar. 79, 85; *Dudley v. Mallery*, 4 Geo. 52, 65; *Williams v. Howard*, 3 Murphy, 74; *Pasley v. Martin*, 5 Richardson Eq. 351; *Reese v. Holmes*, 5 Rich. Eq. 531; *Leftin v. Erspy*, 4 Yerg. 84, 92; *Henderson v. Vaux*, 10 Yerg. 30, 37; *Summers v. Bean*, 13 Gratt. 404; *Caldwell v. Myers*, Hardin, 551.

(1) See *Lowther v. Ld. Lowther*, 1 Ves. 95.

(2) *Dowling v. Bitjemann*, 2 J. & H. 544; 8 Jur. (N. S.) 538. In this case, which was a suit by an artist seeking to obtain possession of a picture, it was conceded that a court of equity has undoubted jurisdiction to order the delivery up

SEC. 13. Applying the same principle, courts of equity will, at the suit of the persons legally entitled to them, decree the delivery up of deeds and other instruments in writing, since damages are inadequate and the legal actions for the recovery of possession are imperfect in their operations.(1) This equity suit to compel the specific delivery of chattels, deeds and the like, possesses another great and incidental advantage over the legal remedy, since the plaintiff is not compelled, as in trover, to prove a conversion of the article, or a refusal to surrender possession of it when demanded. In equity the court looks at the case made by the defendant. It is not necessary to apply to a defendant before a suit is instituted; if the defendant says, "if you had applied to me I should not have contested your claim," and makes no resistance, then, undoubtedly, he gets the costs of it; but if it appears that an application would have been useless, and that the defendant resists at the hearing, the court looks at the case exactly in the same point of view as if that right had been insisted upon before the bill had been filed.(2)

SEC. 14. The jurisdiction which I am describing is greatly enlarged where a trust or fiduciary relation exists in relation to chattels. If an express trust has been created by the terms of the contract, or if a constructive trust has arisen from the acts or omissions of the parties,

of a painting when it has a special value, and the legal remedy is therefore inadequate, but since his agreement and the averments of his pleadings showed that the plaintiff had himself put a fixed price upon the picture, it was held that damages would, under the circumstances, be an adequate remedy, and that there was no necessity for any interference by an equitable tribunal. The proposition of the text practically amounts to this, that a party may by his own acts put a certain value upon a unique chattel, which can be recovered at law, and which, being his own estimate, will be taken as a sufficient compensation.

(1) *Brown v. Brown*, 1 Dick. 62; *Armitage v. Wadsworth*, 1 Mass. 192; *Reeves v. Reeves*, 9 Mod. 128; *Tanner v. Wise*, 3 P. Wms. 296; *Harrison v. Southcote*, 1 Atk. 528; *Jackson v. Butler*, 2 Atk. 306; *Ford v. Peering*, 1 Ves. 72; *Papillon v. Voice*, 2 P. Wms. 478; *Duncombe v. Mayer*, 8 Ves. 320; *Knye v. Moore*, 1 S. & S. 61; *Freeman v. Fairlie*, 3 Mer. 30; *Gray v. Cockeril*, 2 Atk. 114; *Dutchess of Newcastle v. Pelham*, 3 Bro. P. C. 460 (Tom. ed.); *Reece v. Trye*, 1 D. G. & Sm. 273; *Lady Beresford v. Driver*, 14 Beav. 387; 16 Beav. 134; *Tudor's Lead. Cas. on Real Prop.* p. 75 (2d ed.) and cases cited. The delivery of a certificate of registry of a ship may be decreed against a person unlawfully detaining it. *Gibson v. Ingo*, 6 Ha. 112. Mortgage deeds having been wrongfully procured by an agent of the owner, Lord HARDWICKE decreed that they should be surrendered up by the pledgee, and said: "That the plaintiff might have had an action of trover, but then he could only have damages for the detaining but not the deeds themselves, and therefore he was right in bringing a suit in equity for the recovery of his deeds"; and see *Cowles v. Whitman*, 10 Conn. 121; *Hill v. Rockingham Bank*, 44 N. H. 567.

(2) *Turner v. Letts*, 20 Beav. 191, per Lord ROMILLY, M. R.

equity will decree a specific performance of the contract and compel a specific delivery of the chattels, whatever be their nature, special or common; and the same equitable relief will be granted to enforce a fiduciary duty or confidence reposed, which is not in the strict sense of the term a trust, as in the case of an agency. The court will, if necessary, interfere by injunction to restrain any improper disposition of or dealing with the chattels by the person upon whom the trust or fiduciary obligation rests.(1)

(1) *Wood v. Rowcliffe*, 3 H. L. 304; 2 Phil. 382; *Lingen v. Simpson*, 1 S. & S. 600; *Pooley v. Budd*, 14 Beav. 34; *Clark v. Flint*, 22 Pick. 231; *Cowles v. Whitman*, 10 Conn. 121; *Stanton v. Percival*, 5 H. L. Cas. 257, 268; *Ferguson v. Paschall*, 11 Mo. 267; *McGowin v. Remington*, 12 Pa. St. (2 Jones) 56; *Abbott's Ex'r v. Reeves*, 13 Wright, 494; *Mechanics' Bank v. Seton*, 1 Peters, 309; *Hill v. Rockingham Bank*, 44 N. H. 507; *Peer v. Kean*, 14 Mich. 354. In *Pooley v. Budd*, 14 Beav. 34, 43, 44. Lord ROMILLY, M. R., said: "For instance, if a man about to contract marriage, and possessed of a large and valuable quantity of iron, lead, or copper ore, assigned that ore to the trustees of the settlement in trust to sell and invest the proceeds, and hold the proceeds when invested upon the trusts of the settlement, there can be no question but that this court would, before the sale, compel the possessor of the ore and the trustees of the settlement to fulfill every part of the trust which one had undertaken to constitute and the other had undertaken to execute." In *Stanton v. Percival*, 5 H. L. Cas. 257, 268, where a person had by contract made himself trustee of stock for another person, with whose money it had been purchased, a transfer of the stock to the beneficial owner was compelled. For a similar case, see *Cowles v. Whitman*, 10 Conn. 121. In *Clark v. Flint*, 22 Pick. 231, 239, the owner of a brig had contracted in writing for a valuable consideration, to hold her in trust for the plaintiff and subject to his order and disposition, and had then sold her to a third person who had notice of the former contract. The original contractor being insolvent, it was held that a specific performance should be decreed. On this point WILDE, J. said: "It is objected that the court ought not to exercise jurisdiction in equity for a specific performance of agreements relating to personal property. And, generally, that rule has been observed in the English courts, but has been subject to numerous exceptions, and has been uniformly limited to cases where a compensation in damages furnishes a clear and adequate remedy. If the party complaining has no such remedy, it is quite immaterial whether the contract relates to real or personal estate. The exercise of equity jurisdiction does not proceed upon any distinction between real estate and personal estate, but because damages at law may not in the particular case afford a complete remedy. The reasons given for a distinction between real estate and personal estate are not very satisfactory. All, as it seems to me, that can fairly be inferred from the cases on this point is, that in contracts respecting personal estate a compensation in damages is much oftener a complete and satisfactory remedy, than it is in those which relate to real estate. But in all cases if a party has not such a remedy, a court of equity will entertain jurisdiction, and grant relief as justice may require." In the decision of the case some reliance was placed upon the contractor's insolvency as rendering damages inadequate. This fact, however, at the present day, and with courts accustomed to the exercise of full equity powers, would be regarded as wholly immaterial under similar circumstances of trust and confidence. For the opinion in *McGowin v. Remington*, 12 Pa. St. (2 Jones) 56, see *ante*, § 12, note (1).

SEC. 15. There are numerous other instances, which cannot easily be referred to any general class, in which contracts have been specifically enforced on the ground that damages would be inadequate. The following are examples. A contract for the sale and delivery of chattels which are essential in specie to the plaintiff, and which the defendant can supply, while no one else can, could be specifically enforced. This case falls directly within the reasons of the doctrine, for the plaintiff could not, with any amount of damages in his hand, go into the market and purchase other articles of the same kind and value.(1) It would not, however, be extended beyond those reasons, and applied when a sufficient supply of materials could be reasonably obtained elsewhere. Again, contracts for the delivery of goods will be specifically enforced, when by their terms the deliveries are to be made and the purchase price paid in installments running through a considerable number of years. Such contracts "differ from those that are immediately to be executed." Their profits depending upon future events, cannot be estimated in present damages, which must, of necessity, be almost wholly conjectural. To compel a party to accept damages under such circumstances is to compel him to sell his possible profits at a price depending upon a mere guess.(2)

(1) *Buxton v. Lister*, 3 Atk. 383, per Lord HARDWICKE, who puts the case of an owner of timber contracting to sell it to a ship builder, who was under a contract to complete a ship within a given time, for which the timber purchased was necessary, and from no other person could a supply be procured. See *Ward v. Duke of Buckingham*, cited in 3 Atk. 385; 10 Ves. 161. Agreement to pay off or discharge a mortgage. *Barkley v. Barkley*, 14 Rich. Eq. 12; *Bennett v. Abrams*, 41 Barb. 619; *Weir v. Mundell*, 3 Brews. 594. See, also, *Hovel v. Miller*, 2 Dur. 103; *Howe v. Nickerson*, 14 Allen, 400; *Watkins v. Maule*, 2 J. & W. 242; *Lyde v. Mynn*, 4 Sim. 505; 1 Myl. & K. 683; *Wellesley v. Wellesley*, 4 My. & Cr. 554, 559; *Stark v. Wilder*, 36 Vt. 752, 559.

(2) *Taylor v. Neville*, cited in *Buxton v. Lister*, 3 Atk. 384; *Ball v. Coggs*, 1 Bro. P. C. 140 (Toml. ed.). In *Taylor v. Neville*, Lord HARDWICKE decreed specific performance of a contract for the sale of 800 tons of iron to be delivered and paid for by installments, in a certain number of years. In *Ball v. Coggs*, the contract was to pay the plaintiff a certain annual sum for his life and also a certain other sum for every hundred weight of brass wire manufactured by defendant during the life of the plaintiff. A specific performance was decreed by the H. of L. on the ground that damages would be conjectural and inadequate, and to compel plaintiff to take damages would be to compel him to sell the annual provision during his life secured by the contract, at a mere conjectural price. See the remarks of Sir W. PAGE WOOD, V. C., in *Pollard v. Clayton*, 1 K. & J. 462, 474, criticising *Taylor v. Neville*. It seems plain, however, that the decision by Lord HARDWICKE falls directly within the decision and the reasons therefor in *Ball v. Coggs*. The V. C.'s objections are too narrow. A contract to purchase the arch stone, span-drill stone, and Braneley Fall stone contained in the old Westminster Bridge, was specifically enforced by Lord ROMILLY, M. R., in *Thorn*

SEC. 16. The following are additional instances of special agreements which have been specifically enforced because the remedy of damages would afford no just and adequate compensation: A contract to insure; (1) ante-nuptial agreements containing stipulations concerning personal property; (2) a general covenant to indemnify; (3) an agreement to compromise a judgment debt, by accepting a promissory note made by a third person for a portion of the amount; (4) an agreement which had been partly carried out by a creditor to accept and receive such goods of the debtor as he might select in payment of his claim, the court decreed that a master should select and deliver the residue of the goods, in case the creditor refused to make the selection himself; (5) an award dividing the vats and hides, assets of a firm, equally among the partners; (6) an agreement between A. & B. that A. should furnish a large number of peach trees, and that B. should plant them on his farm, market the fruit, and account for the profits; A. having furnished the trees the contract was specifically enforced for the benefit of A. and his assigns. (7)

SEC. 17. *Contracts concerning things in action.* The ancillary and supplementary nature of the equitable remedy is exhibited in the clearest light by the course of decisions upon contracts concerning the various species of stocks. It is a settled rule that agreements to

*v. Commrs. of Public Works*, 32 Beav. 490. See *Schotsmans v. Lancashire*, etc. R. R. Co., L. R. 2 Ch. 332.

(1) *Carpenter v. The M. Ins. Co.* 4 Sandf. Ch. 408; *Neville v. Merchants'*, etc. Ins. Co., 19 Ohio, 452; *Taylor v. Merchants'*, etc., Ins. Co., 9 How. U. S. 390.

(2) *Tarbill v. Tarbill*, 9 Allen, 278; an agreement that the wife should relinquish her dower, in consideration of the transfer of certain shares of stock; *Bateman v. Porter*, 9 Allen, 234, agreement that real and personal property should be settled to the wife's use, in consideration of her consent to give up all interest in her husband's estate; *Gough v. Crane*, 3 Md. Ch. 119; 4 Md. 316, where a verbal ante-nuptial agreement concerning the wife's chattels and things in action, void by the statute of frauds, had been part performed.

(3) *Chamberlain v. Blue*, 6 Blackf. 491, 492. In an able opinion discussing the general principles the court cited approvingly *Taylor v. Neville*, *Buxton v. Lester*, and *Adderly v. Dixon*, and concluded: "Courts of equity will also in many cases decree the specific execution of personal contracts, where injury is apprehended, but not yet sustained." *Per contra*, see *Hoy v. Handsborough*, 1 Freem. Ch. 533.

(4) *Phillips v. Berger*, 2 Barb. 609; S. C. on app., 8 id. 527.

(5) *Very v. Levy*, 13 How. 345. See in connection, *infra*, cases concerning contracts where valuation is to be made by valuers.

(6) *Kirksey v. Fike*, 27 Ala. 383.

(7) *McKnight v. Robbins*, 1 Halsted Ch. 229, 642; and see *Ashe v. Johnson*, 2 Jones Eq. 149; *Sullivan v. Tuck*, 1 Md. Ch. 59; *Furman v. Clark*, 3 Stockt. 306; *Steward v. Winters*, 4 Sandf. Ch. 587; *Hall v. Joiner*, 1 Rich. (N. S.) 186; *Starnes v. Newsome*, 1 Tenn. Ch. 239.

purchase and sell, or deliver shares of government or other public stocks, will not be specifically performed in equity, because such securities are always for sale, their price is known, and the damages awarded at law will enable the injured party to make himself whole by purchasing in the market.(1) On the other hand, it is now equally well established in England that contracts for the purchase, sale, or delivery of railway and other similar shares, will be specifically enforced, at the suit either of the purchaser or the vendor. The reasons of the distinction, as given by the court in a leading case, are as follows: "The only question is whether there has been any decision from whence you can extract a conclusion that the court will not decree a specific performance of an agreement for the sale of such shares. Now I agree that it has been long since decided, that you cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock. But, in my opinion, there is not any sort of analogy between a quantity of 3l. per cents., or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market), and a certain number of railway shares of a particular description, which railway shares *are limited* in number, and which, as has been observed, are not always to be had in the market."(2) A contract for the sale of shares in a joint-stock association has been specifically enforced, although there was a provision in the deed of settlement "that no shareholder shall be at liberty to transfer his shares, except in such a manner as the board of directors should approve."(3)

(1) *Cud v. Rutter*, 1 P. Wms. 570; *Cappun v. Harris*, Bunnb. 135; *Nutbrown v. Thornton*, 10 Ves. 161, per Ld. ELDON; *Doloret v. Rothschild*, 1 S. & S. 590; *Shaw v. Fisher*, 5 D. G. M. & G. 596.

(2) *Duncuft v. Albrecht*, 12 Sim. 189, per Sir L. SHADWELL, V. C., afterwards affirmed by the L. C.; *Shaw v. Fisher*, 2 DeG. & Sm. 11; 5 DeG. M. & G. 596; *Wynne v. Price*, 3 DeG. & Sm. 310; *Wilson v. Keating*, 7 W. R. (M. R.) 484; *Cheale v. Kenward*, 3 DeG. & J. 27.

(3) *Poole v. Middleton*, 29 Beav. 646, per Ld. ROMILLY, M. R. In *Doloret v. Rothschild*, 1 S. & S. 590, Sir John LEACH held that a contract for the purchase of Napolitan stock should be specifically enforced, when the bill prayed for the delivery of the certificates which would constitute the plaintiff proprietor of a certain quantity of the stock, for the reasons, as he said, that "a court of law could not give the property, but could only give a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party. I consider, also, that the plaintiff, not being the original holder of the scrip, but merely the bearer, may not be able to maintain any action at law upon the contract, and that if he has any title, it must be in equity." See, also, *Colt v. Netterville*, 2 P. Wms. 304. A specific performance of contracts for sale and purchase or delivery of such shares is now a matter of every-day occurrence in England, complicated,



SEC. 18. These reasons, which have led the English courts to draw so sharp a distinction between government and other public stocks and shares in companies, do not apply with all their force in this country. The English companies are not, in general, corporations, but are joint-stock associations, or modified partnerships. Although organized under statute, their powers are largely derived from, and regulated by, the articles of association or deed of settlement entered into by the members of each company by itself. Although their shares are bought and sold in the market, yet the modes of the transfer are always cumbrous, and often very much restricted by the regulations of the settlement deed. In this country, the companies issuing stock are, with very few exceptions, corporations, their charters either being special acts of the legislature, or formed in pursuance of general statutes. By the universal customs of the stock market and of business men, certificates of stock are transferred by delivery, and this method is recognized by the law as conferring a complete beneficial title upon the assignee. In short, the shares of stock corporations in this country are regulated, bought, sold, and transferred with as much ease and publicity as the national or state governmental securities, or the public debt of England. The same is true of the coupon bonds issued by our great business and municipal corporations, which are transferred by delivery, like negotiable notes payable to bearer, and which are constantly bought and sold in all the financial markets of the country to an enormous extent. These facts make it very clear that the reasons upon which the English judges have based their recent decisions, above cited, concerning contracts for the sale or delivery of shares, have little or no force when applied to similar agreements in the United States, and the American courts might well refuse to adopt those reasons and follow those decisions, without

however, by the varying and often minute provisions respecting the mode of transfer found in the articles of different companies, and by the customs of the London Stock Exchange. The following are recent cases on the subject: *Bermingham v. Sheridan*, 33 Beav. 660, 665; *Robinson v. The Chartered Bank*, Law Rep. 1 Eq. 32; *Cheale v. Kenward*, 3 DeG. & Jo. 27; *Jackson v. Cocker*, 4 Beav. 59; *New Brunswick, etc., Co. v. Muggeridge*, 4 Drew. 683; *Oriental Inland Steam Co. v. Briggs*, 2 J. & H. 625; *Sheffield Gas, etc., Co. v. Harrison*, 17 Beav. 294; *Harris v. North Devon Railway Co.* 20 Beav. 384; *Hawkins v. Maltby*, L. R. 3 Ch. 188; L. R. 4 Ch. 200; L. R. 6 Eq. 505; *Emmerson's Case*, L. R. 1 Ch. 433; *Coles v. Bristowe*, L. R. 4 Ch. 3; L. R. 6 Eq. 149; *Cruse v. Paine*, L. R. 4 Ch. 441; L. R. 6 Eq. 641; *Merry v. Nickalls*, 20 W. R. (L. J.) 929; 27 L. T. (N. S.) 12; 20 W. R. 531; 26 L. T. (N. S.) 496; *Rennie v. Morris*, L. R. 13 Eq. 203; *Paine v. Hutchinson*, L. R. 3 Ch. 388; L. R. 3 Eq. 257; *Hodgkinson v. Kelly*, L. R. 6 Eq. 496; *Evans v. Wood*, L. R. 5 Eq. 9; *Shepherd v. Gillespie*, L. R. 5 Eq. 293.

infringing, in the slightest degree, upon the equitable doctrines relating to specific performance, which the tribunals of both nations equally recognize and administer by their judgments.

SEC. 19. The decisions by the courts of this country are, as might be expected, conflicting. In some cases it has been held, following the English doctrine implicitly, that shares in a railroad or other similar company, differ from government securities, that they do not have a specific value, and are not always to be found in the market, and that contracts for their purchase, sale, or delivery will be specifically enforced.(1) Other cases simply hold that the specific performance of a contract for the transfer or delivery of stocks may be decreed where there is no adequate legal remedy.(2) The weight of American authority, however, seems to be in favor of the rule that stocks of business corporations, at all events when they are commonly sold in the market, stand upon the same footing as public, governmental securities, and that the legal remedy of damages for the breach of a contract is as adequate a remedy in the one case as in the other. Certainly, there can be no valid distinction, in this respect, between shares of stock in banks, insurance companies, railway companies, manufacturing corporations, and the like, if they are all customarily for sale in the public market, and many of the decisions do not insist on or even allude to this limitation as necessary.(3)

SEC. 20. Analogous to the case of shares, under the English rule, is that of things in action. Contracts for the purchase, sale, or assignment of things in action, will often be enforced at the suit of the purchaser, by compelling the vendor to transfer and deliver, where the legal damages might be too uncertain and conjectural to constitute an adequate compensation. And, as the remedy must be mutual, the vendor may also maintain his action for a specific performance, and

(1) *Ashe v. Johnson*, 2 Jones Eq. 149. See *Baldwin v. Commonwealth*, 11 Bush. 417, in respect to a sale of turnpike stock made by state commissioners.

(2) *Todd v. Taft*, 7 Allen, 371; *Leach v. Fobes*, 11 Gray, 506; *Treasurer v. Commercial, etc.*, Co. 23 Cal. 390.

(3) *Cowles v. Whitman*, 10 Conn. 121, 124; *Brown v. Gilliland*, 3 Dessau. 539, 541; *Bissell v. Farm. & Mech. Bank of Mich.* 5 McLean, 495; *Ferguson v. Paschall*, 11 Mo. 267; *Austin v. Gillespie*, 1 Jones Eq. 261; *Strasbourg R. R. Co. v. Echternact*, 21 Pa. St. 220; *Gram v. Stebbins*, 6 Paige, 124. *Cowles v. Whitman*, *supra*, related to bank stock. A contract to deliver government bonds or marketable railway shares will not be specifically enforced, per DILLON, J., in *Fallon v. R. R. Co.* 1 Dill. 121; *Ross v. Union Pac. R. R.* 1 Woolw. 26, 36; *Carpenter v. Ins. Co.* 4 Sandf. Ch. 408; *Lowry v. Muldrow*, 8 Rich. Eq. 241; *McGowin v. Remington*, 12 Pa. St. 56; *Sullivan v. Tuck*, 1 Md. Ch. 59; *Waters v. Howard*, 1 Md. Ch. 112.

compel payment of the purchase-money. The following are illustrations: An agreement, by the assignee of certain debts, which had been proved, under a commission of bankruptcy, against the debtor, agreed to sell them to a third person for 2s. 6d. on the pound. A specific performance was decreed in a suit brought by the vendor.(1) An agreement for the purchase of an annuity, payable out of certain funds standing in the court of chancery, has also been enforced at suit of the vendor,(2) and also an agreement for the purchase of a life annuity;(3) and a contract to purchase a debt.(4) On the same principle, because its value is uncertain and conjectural, and there is no accurate measure of damages, a contract for the sale of a patent right will be specifically enforced against the vendor, by compelling him to execute and deliver an assignment; and consequently the vendor may, by a suit of the same sort, compel the purchaser to accept the transfer and pay the purchase price.(5)

(1) *Adderley v. Dixon*, 1 S. & S. 607, per Sir JOHN LEECH: "The present case being a contract for the sale of the uncertain dividends, which may become payable from the estate of a bankrupt, it appears to me that, upon the principles established by the cases of *Ball v. Coggs*, and *Taylor v. Neville*, a court of equity will decree specific performance, because damages at law cannot accurately represent the value of future dividends; and to compel this purchaser to take such damages would be to compel him to sell those dividends at a conjectural price. It is true that the present bill is not filed by the purchaser, but by the vendor, who seeks not the uncertain dividends, but the certain sum to be paid for them. It has, however, been settled by repeated decisions, that the remedy in equity must be mutual, and that where a bill will lie for the purchaser, it will also lie for the vendor." And see *Cutting v. Dana*, 25 N. J. Eq. 265.

(2) *Withy v. Cottle*, 1 S. & S. 174, per Sir JOHN LEACH, "There can be no doubt that the defendant, who is the purchaser of this annuity, might have filed a bill for the specific performance of the agreement for sale to him, because a court of law could not give him the subject of his contract, and the remedy here must be mutual for purchaser and vendor." See *Clifford v. Turrell*, 1 Y. & C. C. C. 138; 9 Jur. 633.

(3) *Kenney v. Wexham*, 6 Mad. 355, 357.

(4) *Wright v. Bell*, 5 Price, 325. In *Cutting v. Dana*, 25 N. J. Eq. 265, it was held that a contract for the sale of a debt would be specifically enforced in equity, where there was no adequate remedy at law, or where some other equitable feature was present; for example, where the creditors of an insolvent firm agreed to sell their claims against it to one of their number, at twenty-five cents on the dollar. A contract to deliver a paid-up life insurance policy, for a certain sum, has been specifically enforced against the insurance company. *Hughes v. Piedmont, etc.*, Life Ins. Co. 53 Geo. 111; and also a contract, by the holder of notes, to deliver them up to the maker to be canceled. *Tuttle v. Moore*, 16 Minn. 123; an agreement to assign a contract between defendant and a third person. *Woodward v. Aspinwall*, 3 Sandf. 272.

(5) *Cogent v. Gibson*, 33 Beav. 557; *Corbin v. Tracy*, 34 Conn. 325; *Somerby v. Buntin*, 118 Mass. 279; *Binney v. Annan*, 107 Mass. 94; *Ely v. McKay*, 12 Allen, 323.

SEC. 21. *Awards*.—The specific enforcement of awards is governed by exactly the same principles which regulate the equitable jurisdiction in its application to contracts. If the provisions of the award are of such a nature that, had they constituted an agreement between the parties, it would have been enforced by a court of equity, then a specific performance of the award itself will be decreed; otherwise it will not be decreed. Considered in respect to its capability of being specifically enforced, an award is not looked upon as a decision emanating from the arbitrators, but rather as a continuation and consummation of the contract by which the parties submitted their matters in controversy to arbitration, and, impliedly at least, undertook to abide by the result.(1) In pursuance of these principles, an award, like a contract, which directs the doing of anything *in specie*, within the power of the court to enforce—as, for example, the conveyance of land, or the assignment of things in action, may be specifically performed;(2) or where it directs the delivery of certain specific chattels, and no adequate remedy could be had by a recovery of damages.(3) But an award, which simply orders a payment of money, will not, it seems, be specifically enforced in equity.(4)

SEC. 22. *Contracts for Personal Acts*.—In all the species of contracts to which reference has, thus far, been made, the subject-matter has

(1) *Blackett v. Bates*, L. R. 1 Ch. 117, reversing S. C., 2 H. & M. 270, per Ld. Ch. CRANWORTH: "The rights of the parties, in respect of specific performance, are the same as if the award had been simply an agreement between them. Had it been an agreement, would there have been a case for specific performance? I think not, and for this short and simple reason, that the court does not grant specific performance unless it can give full relief to both parties." In *Wood v. Griffith*, 1 Sw. 54, Ld. ELDON said, the court exercises jurisdiction, "because the award supposes an agreement between the parties, and contains no more than the terms of that agreement ascertained by a third person." See *Nickels v. Hancock*, 7 DeG. M. & G. 300.

(2) *Norton v. Mascall*, 2 Vern. 24; *Hall v. Hardy*, 3 P. Wms. 187; and see *McNeil v. Magee*, 5 Mas. 245; *Jones v. Boston Mill Corpn.*, 4 Peck, 507; *Davis v. Havard*, 15 S. & R. 165, 171; *Somerville v. Truman*, 4 Har. & McH. 43; *Wood v. Shepherd*, 2 Patton & Heath, 442 (Va.); *Cook v. Vick*, 2 How. (Miss.) 882. Equity will specifically enforce an award concerning land, or an agreement for the purchase or sale of land, although the enforcement of an award for the payment of money is also involved in the relief. *Memphis, etc., R. R. v. Scruggs*, 50 Miss. 284. See, also, *Overby v. Thrasher*, 47 Geo. 10.

(3) *Story v. Norwich, etc.*, R. R., 24 Conn. 94; *Kirksey v. Fike*, 27 Ala. 383.

(4) *Hall v. Hardy*, 3 P. Wms. 187; and see *Story v. Norwich, etc.*, R. R. 24 Conn. 94; *Bubier v. Bubier*, 24 Me. 42; *Turpin v. Banton*, Hardin, 312. As to the enforcement, in equity, of awards legally invalid, see *Viele v. Troy & Bost. R. R.*, 21 Barb. 381; *Bouck v. Wilber*, 4 Johns. Ch. 405; *Buyss v. Eberhardt*, 3 Mich. 524; *Cook v. Vick*, 2 How. (Miss.) 882.

been things—land, chattels, or things in action. The particular rules which have been established in reference to the specific execution of agreements stipulating merely for personal acts or omissions, also exhibit, in the most striking manner, the ancillary and supplementary nature of the remedy. As a general proposition, contracts which provide for the personal affirmative acts, or personal services of the parties, are not specifically enforced in equity, not because the legal remedy of damages is always sufficiently certain and adequate, but because the courts do not possess the means and ability of enforcing their decrees, which would necessarily be very special, and of compelling the performance which constitutes the equitable remedy. Wherever, from the nature of the agreement, the difficulty in the way of granting relief does not exist, or can be obviated, the principles and rules of specific performance apply to contracts which stipulate for personal acts or omissions, as well as to those whose subject-matter is real or personal property. A few examples of such application will suffice as illustrations. Agreements for a separation between husband and wife, if valid in form, made upon a sufficient consideration, and executed by parties legally able to contract, will be specifically enforced, by decreeing the execution and delivery of the proper deed, and by restraining the husband, if necessary, from personally interfering with, and molesting his wife, in violation of his covenant.(1) Such contracts, in order to be enforced, must be based upon a valuable consideration, accruing to the benefit of the husband ;(2) and in England, a third person, other than the wife, must intervene as the contracting party on her behalf, although she generally executes the agreement, in order to show her assent.(3) It is plain that, for the breach of these agreements, damages would be wholly inadequate, and it would seem that no legal measure of damages is possible—*i. e.*, any thing but a mere conjecture.

(1) *Wilson v. Wilson*, 1 H. L. Cas. 538 ; 5 H. L. Cas. 40 ; 14 Sim. 405 ; *Fletcher v. Fletcher*, 2 Cox, 99 ; *Sanders v. Rodway*, 22 L. J. Ch. (N. S.) 230 ; *McCrocklin v. McCrocklin*, 2 B. Mon. 370 ; *Gibbs v. Harding*, L. R. 5 Ch. 336 ; S. C., L. R. 8 Eq. 490.

(2) *Wilson v. Wilson*, *supra* ; *Wellesley v. Wellesley*, 10 Sim. 256 ; *Stephens v. Olive*, 2 Bro. C. C. 90 ; *Earl of Westmeath v. Countess of Westmeath*, Jac. 126, 141 ; *Elworthy v. Bird*, 2 S. & S. 372 ; *Hobbs v. Hull*, 1 Cox, 445.

(3) *Hope v. Hope*, 26 L. J. Ch. 417 ; *Wilkes v. Wilkes*, 2 Dick. 791 ; compare *Vansittart v. Vansittart*, 4 K. & J. 62. *Query*. Whether such third person would be necessary in those states of this country, which have so greatly enlarged the wife's power to contract, especially if the agreement related, in any way, to her own separate property.

SEC. 23. *Contracts for building and construction.* The general rule is now well settled that, on account of the great difficulty and often impossibility attending a judicial superintendence and execution of the performance, contracts for the erection or repair of buildings, the construction of works, and the conduct of operations requiring time, special knowledge, skill, and personal oversight, will not be specifically enforced.(1) Notwithstanding this general rule and the cogent reason which supports it, there are certain exceptions; and contracts for building or for the construction of works, and the like, falling within them, may be specifically enforced. 1. It has been said that if an agreement for erecting a building is in its nature defined, there is no difficulty in entertaining a suit for its specific performance.(2) But a contract to build a house of a certain value merely, does not come within this description of an agreement sufficiently defined, and will not be enforced.(3) 2. Whether or not the opinion of *Ld. Rosslyn* is to be regarded as a correct statement of the law, it is settled by the recent English decisions, that where the defendant has contracted to construct some work which is defined on his own land, and where the plaintiff has a material interest in the execution thereof, which is not susceptible of adequate compensation in damages, a specific performance of the undertaking will be compelled.(4) 3. Where the

(1) *Paxton v. Newton*, 2 Sm. & Giff. 437; *Errington v. Aynesley*, 2 Bro. C. C. 341; 2 Dick. 692; *Lucas v. Commerford*, 3 Bro. C. C. 166; *Mosely v. Virgin*, 3 Ves. 184; *e. g.*, to make good a gravel pit, *Flint v. Branton*, 8 Ves. 159; the construction of a branch railway, *So. Wales R'y Co. v. Wythes*, 1 K. & J. 183; 5 DeG. M. & G. 880; an agreement between two railroad companies, by which one agreed to construct the road and the other run it, *Port Clinton R. R. v. Cleveland & Toledo R. R.* 13 Ohio St. 544; and see *Fallon v. R. R. Co.* 1 Dillon, 121; *Reese v. Union Pacific R. R.* 1 Woolworth, 26; to work quarries, *Booth v. Pollard*, 4 Y. & C. Ex. 61; to work a quarry and deliver marble in certain kinds and quantities, *Marble Co. v. Ripley*, 10 Wall. 339; to work coal mines, *Pollard v. Clayton*, 1 K. & J. 402. There were early decisions or opinions *contra*, see *Buxton v. Lister*, 3 Atk. 385, per Lord HARDWICKE; *City of London v. Nash*, 3 Atk. 512; 1 Ves. Sen. 12. It is settled that a covenant to repair will not be specifically enforced, *Rayner v. Stone*, 2 Eden. 128, 130 (n.); *Hill v. Barclay*, 16 Ves. 402, 405.

(2) *Mosely v. Virgin*, 3 Ves. 185, per *Ld. Rosslyn*; *Cubitt v. Smith*, 10 Jur. (N. S.) 1123; *Flint v. Brandon*, 8 Ves. 159, 164; *Phillips v. Soule*, 9 Gray, 233; *Moore v. Greg*, 12 Jur. 952.

(3) *Brace v. Wehnert*, 25 Beav. 348. The operative part of the contract was to build a house, worth 1400*l.* at least, and no plan was adopted. See, also, *Norris v. Jackson*, 1 J. & H. 319.

(4) *Storer v. Great Western R'y Co.* 2 Y. & C., C. C. 48; *Sanderson v. Cocker-mouth, etc.*, R'y Co. 11 Beav. 497. In these cases the railway companies were directed to fulfill their agreements by making and maintaining arch-ways under their tracks, so that plaintiff might have access with teams from one part of his

defendant has undertaken to construct certain works upon land acquired by conveyance from the plaintiff, so that the plaintiff, having parted with his land, cannot erect the stipulated structures thereon at his own cost, and thus ascertain the amount which he should be entitled to recover from defendant as damages for the breach of the

land to another, which were separated by the road. *Greene v. West Cheshire R'y Co.*, L. R. 13 Eq. 44; *Wilson v. Furness R'y Co.*, L. R. 9 Eq. 28; *Attorney-General v. Mid. Kent R'y Co. and So. Eastern R'y Co.*, L. R. 3 Ch. 100; *Lytton v. Great Northern R'y Co.* 2 K. & J. 394. In *Franklin v. Tuton*, 5 Madd. 469, Sir JOHN LEACH compelled the defendant to alter the elevation of the house, which he had built on land leased from the plaintiff, pursuant to his covenant to erect the house of a certain height, which he had not done. In *Lane v. Newdigate*, 10 Ves. 192, Ld. ELDON, by a mandatory injunction, compelled the defendant to repair a canal, in pursuance of his covenant, for plaintiff's benefit. In *Middleton v. Greenwood*, 2 DeG. J. & S. 142, defendant agreed to grant the plaintiff a lease of a public house, "and to make and form a spirit vault, and put in plate-glass windows, and do everything therewith necessary at his own expense, and paint new the outside of all the woodwork, as well as put the slates, chimney pots, and roofing in thorough repair." *Held*, that a specific performance of the agreement to give a lease should be decreed, and they having jurisdiction, the court would, under Sir HUGH CAIRNS act (21 & 22 Vict., Ch. 27, § 2), direct an inquiry as to the damages for non-performance of the rest of the contract to be paid by the defendant. "These matters are mere incidents of the agreement, not affecting the substance," p. 145, per L. J. TURNER.

*Wilson v. West Hartlepool R'y Co.* 2 DeG. J. & S. 475. The company agreed to sell to plaintiff a piece of land. Contract provided that the company should lay down a branch railway to the land, and that plaintiff, who was to erect iron works on the land, should use the company's railway in preference to any others—use it whenever reasonably practicable, and for the longest distance it was reasonably capable of use; company made the branch; plaintiff took possession of the land, and his machinery was brought and deposited there. The defendant then refused to complete. *Held*, affirming decision of the M. R., that the provision as to plaintiff's use of defendant's road did not prevent a specific performance. The whole contract would be specifically performed; that clause of it by inserting a proper covenant in the deed binding plaintiff to use the road; see per L. J. TURNER, pp. 494, 495. In *Lillie v. Legh*, 3 DeG. & J. 204, defendant had agreed to lease a farm to plaintiff, and to furnish or pay for materials wherewith plaintiff was to repair and alter the farm buildings. Court decreed a specific performance of the agreement to give the lease, and held, that though the claim for materials was a mere money demand, yet the court had jurisdiction to award damages as an incident to the general relief, p. 208, per L. J. KNIGHT-BRUCE; p. 210, per L. J. TURNER. *Wilson v. Northampton & Banbury Junction R'y Co.*, L. R. 9 Ch. 279. Defendant having bought of plaintiff, agreed to erect, construct, and fit up a station thereon. There was no further description of the station, nor even any stipulations as to its use. A specific performance of this agreement was refused, on the sole ground that it was too indefinite. BACON, V. C., said that it never had been expressly held that a contract to erect a building will never be specifically enforced. "I should require very distinct authority before I said that the court had no jurisdiction to compel the erection of buildings." p. 281.

contract, a court of equity will, if possible, decree a specific performance by the defendant of his agreement. The relation of the parties and the situation of the subject-matter would render the damages, in such a case, almost wholly conjectural.(1) 4. Finally, where there has been a part performance of such a contract, so that the defendant has received and is enjoying the benefits of it *in specie*, the court may compel its specific execution, when, without such part performance, it might not have interfered, but left the plaintiff to his legal remedy.(2) It has been recently held in England that where a private individual is entitled to the specific performance of a contract to make certain works, by a railway company, which would require a reconstruction of its track, the temporary interruption of its business, and consequent inconvenience to the public, are not such obstacles as will prevent the court from granting the relief.(3) The cases on this subject in the

(1) *So. Wales R'y Co. v. Wythes*, 1 K. & J. 200, per PAGE WOOD, V. C.; *Storer v. Great Western R'y Co.* 2 Y. & C., C. C. 48; *Price v. Corporation of Penzance*, 4 Ha. 506; *Soames v. Edge*, Johns. 639; *Wilson v. Furness R'y Co.*, L. R. 9 Eq. 28; *Hood v. North Eastern R'y Co.*, L. R. 5 Ch. 525; 8 Eq. 666. In 1838, the company purchased land from plaintiff, and agreed that a part of it should be forever used as "a first-class station," no other description being given in the contract. A station was erected in 1842, and has since been used. Plaintiff filed this bill to compel the company to build a larger station, alleging that this one was not "first-class." *Held*, that as the present station was not objected to when built, and had remained as it is so many years, the court would not compel the company to make a larger one; also, that the terms of the contract were so indefinite that the court could not enforce it. *Firth v. Midland R'y Co.*, L. R. 20 Eq. 100. The company bought land from the owner and agreed to pay a certain price therefor, and to erect certain bridges thereon for his convenience. It took possession, made its line, but did not construct the stipulated works in any manner. Three or four years after the parties made a substituted agreement, which became nugatory by the death of the person who was appointed by it to award damages, which were to be accepted by the plaintiff. *Held*, the original contract was revived, and it was enforced against the company. *Green v. West Cheshire R'y Co.*, L. R. 13 Eq. 44. The company had taken land, and, for a valuable consideration, had agreed to construct and forever maintain, a "side track" of a specified length, on certain lands of the vendor alongside of the main track, for the vendor's accommodation. *Held*, that the contract could be specifically enforced, and the court would not refuse that relief, although the plaintiff might have a concurrent remedy of damages, or may have entered into a negotiation for a money compensation, which had failed.

(2) *Price v. Corp'n. of Penzance*, 4 Ha. 506, 509. Plaintiff conveyed land to defendants, they covenanting to forthwith make a road and erect a market house. They took possession and made the road, but neglected to erect the market. WIGRAM, V. C., said that the defendants having had the benefit of the contract *in specie*, the court would go to any length that it could to compel them to specifically perform the contract on their part.

(3) *Raphael v. Thames Valley R'y Co.*, L. R. 2 Ch. 147, reversing L. R. 2 Eq. 37.



American courts are few, and do not show that they have as yet adopted all of the foregoing distinctions established by the modern English judges.(1)

SEC. 24. *Enforcement by injunction.*—Another class of contracts stipulating for personal acts are now enforced in England by means of an injunction. Where one person agrees to render personal services to another, which require and presuppose a special knowledge, skill, and ability in the employe, so that, in case of a default, the same services could not easily be obtained from others, although the affirmative specific performance of the contract is beyond the power of the court, its performance will be negatively enforced by enjoining its breach. This doctrine applies especially to contracts made by actors, public singers, artists and others possessing a special skill and ability. It is plain that the principle on which it rests is the same with that which applies to agreements for the purchase of land or of chattels having a unique character and value. The damages for the breach of such contracts cannot be estimated with any certainty, and the employer cannot, by means of any damages, purchase the same services in the labor market. In the leading case, which first established this doctrine, an artist agreed to sing at the plaintiff's theatre, and not to sing at any other during the term of the engagement. The court, conceding that it could not enforce the affirmative stipulation, granted an injunction restraining the defendant from singing elsewhere than at the plaintiff's opera house.(2) The rule has since been extended to cases in which the contract contained no negative stipulation, and it is now settled that such a negative clause is not a necessary prerequisite to the exercise of the jurisdiction.(3)

(1) While the jurisdiction to compel performance of such contracts has been exercised, it has not been systematized and reduced to definite rules, as in England. In *Stuyvesant v. Mayor of N. Y.* 11 Paige, 414, an agreement to open a drain through defendant's land was enforced; *Birchett v. Bolling*, 5 Munf. 442, a contract to build a tavern, at the joint risk and expense, and for the joint benefit of the parties, was enforced at the suit of the plaintiff, who furnished the land on which it was to be erected, and had performed his part, the defendants objecting on the ground that a change in the circumstances had made the scheme unadvisable. In *Whitney v. New Haven*, 23 Conn. 624, New Haven had agreed to buy from the plaintiff certain land, and water of Mill river sufficient to supply the city with pure water, and agreed to pay \$50,000, and to erect a dam and canal to conduct surplus water for plaintiff's use. Specific performance was refused, on the ground that plaintiff had not parted with the land and possession, and consequently had means of complete redress at law.

(2) *Lumley v. Wagner*, 1 De G., M. & G. 604, per Lord St. LEONARDS. See *Fechter v. Montgomery*, 33 Beav. 22; *Catt v. Tourle*, L. R. 4 Ch. 654.

(3) *Webster v. Dillon*, 3 Jur. (N. S.) 432; *Montague v. Flockton*, L. R. 16 Eq. 189.

The American courts, which exhibit a strange disinclination to apply the preventive remedy of injunction to any enlarged uses, have not hitherto followed these modern English authorities, and refuse to enforce the performance of such personal contracts, either negatively or affirmatively.(1)

SEC. 25. The doctrine of specifically enforcing negative contracts by injunction is well established in England, and has been partially adopted by the courts of this country. An agreement that the party will not do certain specified acts—especially if these prohibited acts relate to, or interfere with, property rights or business interests of the obligee—will be specifically enforced in a negative manner by enjoining a commission of the acts, whenever damages would be inadequate, or the basis for their computation would be wholly speculative, conjectural, or uncertain. The rule has been applied in the following instances, among others, in which the parties have been restrained from doing the acts described contrary to their stipulations. An agreement not to ring a bell;(2) an agreement not to carry on a trade;(3) or, not to carry on a certain trade in a place or district specified;(4) an agreement not to erect buildings;(5) or, not to erect buildings above a certain height;(6) an agreement not to make application to Parliament for or against some private bill;(7) an agreement by a railway company not to run any of its

(1) *Sanquirico v. Bennedetti*, 1 Barb. 315; *Hamblin v. Dinneford*, 2 Edw. Ch. 529; *De Rivafinoli v. Corsetti*, 4 Paige, 270; *De Pol v. Sohlke*, 7 Roberts, 280. But see *Hayes v. Willio*, 11 Abb. Pr. (N. S.) 167; *McClurg's Appeal*, 58 Pa. St. 51; *Brown's Appeal*, 62 Pa. St. 17; *Machette v. Hodges*, 6 Phila. 296; *Gillis v. Hall*, 2 Brews. 342.

(2) *Martin v. Nutkin*, 2 P. Wms. 266.

(3) *Barret v. Blgrave*, 5 Ves. 555; 6 Ves. 104; *Williams v. Williams*, 2 Sw. 253; 3 Mer. 157; *Shackle v. Baker*, 14 Ves. 468; *Cruttwell v. Lye*, 17 Ves. 335; *Newberry v. James*, 2 Mer. 446; *Harrison v. Gardner*, 2 Madd. 198.

(4) *Clements v. Welles*, L. R. 1 Eq. 200; *Clarkson v. Edge*, 12 W. R. (M. R.) 518; *Feilden v. Slater*, L. R. 7 Eq. 523; *Jones v. Bone*, L. R. 9 Eq. 674; *Carter v. Williams*, L. R. 9 Eq. 678. Even when the party was an infant, if he had represented himself as adult. *Cornwall v. Hawkins*, 41 L. J. (N. S.) 435, *Jones v. Heavens*, L. R. 4 Ch. D. 636; *Catt v. Tourle*, L. R. 4 Ch. 654. Covenant by purchaser that vendor, a brewer, his heirs and assigns, should have the exclusive right of supplying beer to any public house erected or opened on the land, enforced.

(5) *Rankin v. Huskisson*, 4 Sim. 13.

(6) *Lloyd v. London, Chatham & D. R'y Co.*, 2 DeG., J. & S. 568; *Bowes v. Law*, L. R. 9 Eq. 636.

(7) *Ware v. Grand Junction Waterworks Co.*, 2 R. & My 470, 483; *Heathcote v. North Staffordshire R'y Co.*, 2 Mac. & G. 100; *Lancaster, etc. R'y Co. v. North Western R'y Co.*, 2 K. & J. 293; and see *Taylor v. Davis*, 3 Beav. 388, note.

ordinary or fast trains—other than mail, express, or special trains—past a certain station without stopping for passengers to get on or to alight;(1) an agreement in a separation deed between husband and wife that the children should attend such schools as their father should choose, and should spend their holidays where the trustees should direct, the trustees directing that they should spend one-half of the holidays with their father and the rest with their mother;(2) and to restrain an infringement of a charter-party.(3)

(1) *Hood v. North Eastern R'y Co.*, L. R. 8 Eq. 666; 5 Ch. 525; *Rigby v. Great Western R'y Co.*, 2 Ph. 44; 15 L. J. (N. S.) 266; *Phillips v. Great Western R'y Co.*, L. R. 7 Ch. 409; 20 W. R. 562.

(2) *Hamilton v. Hector*, L. R. 6 Ch. 701. The husband refusing to allow the children to visit the mother, and taking them to his own house entirely, he was restrained from interfering with their passing such time with the mother as the trustees should direct. While the father could not, by agreement, deprive himself of all control over his children, this bargain was reasonable and should be enforced. The following are some recent American cases upon the doctrine discussed in the text. The contract has been enforced by injunction in *Gillis v. Hall*, 2 Brews. (Pa.) 342 (a negative covenant); *Manhattan Manuf., etc., Co. v. New Jersey Stock, etc. Co.*, 23 N. J. Eq. 161; *Manhattan, etc. Co. v. Van Keuren*, ib. 251; *Haskell v. Wright*, ib. 389; *Parker v. Garrison*, 61 Ill. 250 (a contract to sell personal property, enforced by injunction under special circumstances); *Berger v. Armstrong*, 41 Iowa, 447, and *Spicer v. Hoop*, 51 Ind. 365 (both of these cases were of contracts not to engage in a trade); *Richardson v. Peacock*, 26 N. J. Eq. 40, and see *Harkinson's Appeal*, 73 Pa. St. 196 (contracts not to engage in trade); *Frank v. Brunneman*, 8 W. Va. 462 (a lessee restrained from breaking covenants of his lease); and see *Agate v. Lowenbein*, 4 Daly, 62; *Singer's Manuf. Co. v. Union Buttonhole, etc. Co.*, 6 Fisher's Pat. Cas. 480. In *McArthur v. Ashmead*, 2 Brews 533, the vendee in a land contract was enjoined in aid of the vendor's right to a specific performance; *Barnes v. Barnes*, 65 N. C. 201; *Steward v. Winter*, 4 Sandf. Ch. 587. In the following cases an injunction was refused; the refusal, however, being based upon the nature of the contract as not being one which equity could enforce at all, or upon the circumstances of the case, and not upon the absence of power to enforce by injunction. In *Caswell v. Gibbs*, 33 Mich. 331, an agreement "never to tow vessels in competition with" plaintiff, was very properly held not to be enforceable by injunction (1), because it was too uncertain and indefinite, and (2), because every case of alleged breach would require a separate investigation of fact, in order to ascertain whether there had been an actual violation. In *Hahn v. Concordia Soc.*, 42 Md. 460, a contract was secured by what the court decided to be a stipulation for liquidated damages, and not a penalty. *Held*, therefore, that the court would not enforce by injunction, but would leave the plaintiff to his action for the damages. *Hile v. Davison*, 20 N. J. Eq. 228. *Held*, that, under the facts, the vendor in a land contract should not be enjoined from collecting the securities given him for the price. See, also, *Gregg v. Landis*, 21 N. J. Eq. 494.

(3) *DeMattos v. Gibson*, 4 DeG. & J. 276; *Seawell v. Webster*, 7 W. R. 691; *Messageries Imperiales Co. v. Baines*, 11 W. R. 322; *Jervin v. Deshandes*, L. R. 3 Ch. 457.

But the court will not interfere to restrain the breach of such a stipulation where it is merely ancillary to a more general contract, which cannot be specifically enforced in its entirety.<sup>(1)</sup>

SEC. 26. *Inadequacy of damages, Nature of.* — The foregoing examples, selected from various classes of contracts, although by no means exhaustive, sufficiently illustrate the nature and use of the equitable remedy of specific performance considered as a means of supplementing the *inadequate* legal relief of damages. Before proceeding to consider the second basis of the jurisdiction, I shall attempt to ascertain and state the exact import of this inadequacy, and the conditions under which it exists, so that the equitable remedy becomes admissible. Sir JOHN LEACH once, in decreeing a specific performance, gave the reasons for his decision in the following language: "Because a court of law could not give the property, but could only give a remedy in damages, *the beneficial effect of which must depend upon the personal responsibility of the party.*"<sup>(2)</sup> If this dictum were a correct statement of the principles upon which the courts of equity proceed, it is plain not only that the remedy would at times be extended to every species of contract, but also that it would never be extended to all contracts of any particular class; in other words, its use would depend not upon the nature and terms of the contract sought to be enforced, but upon the pecuniary condition of the party, his ability to pay the judgment of damages which might be recovered against him. There are expressions scattered through the judicial opinions—such as "the right to obtain a specific performance is not absolute, *but depends upon the circumstances of each particular case,*" which must be carefully restricted to their exact connections and meaning, or else they will be very misleading. These general expressions describing the effect of circumstances, etc., have no relation whatever to the adequacy of damages as a compensation, but refer exclusively to those surrounding facts and incidents which influence and guide the judicial *discretion* to decree or not the specific performance of a

(1) *Merchants' Trading Co. v. Banner*, L. R. 12 Eq. 18, per Lord ROMILLY, M. R., who said: "The real principle is, that where the stipulation sought to be enforced is really a part of the contract itself, this court cannot specifically perform the contract piece-meal, but it must be performed in its entirety, if performed at all; and when the court cannot perform it in its entirety, neither can it perform any particular portion of it."

(2) In *Doloret v. Rothschild*, 1 S. & S. 590. In a few early American cases, also, the insolvency of the defendant is stated as a partial reason; at least, as a make-weight for granting the relief.

contract which it is assumed might, under the proper conditions, be so conferred.(1)

(1) Certain observations of BECK, C. J., in the recent case of *Richmond v. Dubuque, etc.*, R. R., 33 Iowa, 423, 480, might seem, on a superficial reading, to be diametrically opposed to these statements of the text. As the case is an interesting one, and received very careful consideration from the counsel and the court, I shall quote from it at some length. The contract was very special. It contained, in substance, the following provisions: 1. The defendants—the railroad company—leased certain land to plaintiffs for fifteen years, with the option of extending the term fifteen years more. 2. Plaintiffs agreed to erect and maintain on said land an elevator of sufficient capacity to handle all the grain received by defendants' road, and to increase the capacity if necessary. 3. Defendants agreed not to erect any similar structure, nor to lease any other land at the place for that purpose. 4. Defendants agreed that plaintiffs shall have the handling of all through grain transported on their road, and to pay a specified compensation per bushel for handling and storing the grain delivered by them at said elevator. 5. Defendants agreed at the expiration of the term to pay to the plaintiffs the appraised price of the building. Defendants broke the agreement by refusing to deliver the "through grain" at the plaintiffs' elevator, which had been erected, etc., and, of course, refusing to pay any compensation. The plaintiffs brought this action, praying that defendants' agreement might be specifically enforced, or that damages might be awarded for its breach. The court *held*, that the actual damages sustained by the plaintiffs could be ascertained with sufficient exactness and certainty, and that such damages constituted an adequate compensation, and that, therefore, a specific performance would not be decreed. No allusion is made in the opinion to the impossibility of specifically enforcing the contract, even if damages are conceded to be inadequate, although that question was exhaustively discussed by the counsel. In the introductory part of the opinion by BECK, Ch. J., the following passage occurs, which contains the language referred to at the commencement of this note (p. 480): "It is impossible to state a general rule as to the power of equity to enforce a specific performance of contracts respecting personal property, choses in action and personal services. It is often said that in such cases equity will not entertain jurisdiction. But this doctrine is subject to an exception, or is, rather, limited in its application to cases where compensation in damages does not furnish a complete and satisfactory remedy. The rule is stated, in other words, viz., when the contracting party is entitled to the subject-matter of the contract, and cannot be fully compensated therefor, equity will afford relief. And it is often expressed, in another form, as follows: Equity will not interfere when the injured party has an adequate remedy at law. Now, in the application of the rule, as it is variously announced, the important inquiry always is: What constitutes a complete and adequate remedy, and when would this be afforded by the allowance of damages? It is sometimes said that equity will not interfere because the law will award damages; and in other cases that equity will interfere in cases when the law will give damages, on the ground that the party is not fully compensated thereby. The fact that a court of law will award damages in a given case does not deprive equity of jurisdiction. To deprive the party of an equitable remedy, the damages recoverable at law must be a full compensation and constitute adequate relief. Equity determines this question. We must apply its doctrines, in order to pronounce the relief adequate or inadequate. But here we find no fixed rule to guide us other than *this* one, which is general in its language and application: the remedy sought must be indispens-

SEC. 27. In fact, the adequacy or inadequacy of damages, as a remedy, is not determined by the relations of the parties and terms of

able to justice. But natural justice is not meant, for upon its principles it would appear that all men should be required to specifically perform their contracts. The conclusion is reached that the rules are so general in their nature that but little aid is derived therefrom in determining whether the relief afforded by the law in a given case will be deemed by equity adequate. *Each case is determined upon its own facts and the application of equitable principles.*"

Although there is much in this quotation which is admirable—especially the proposition that the question of the adequacy or inadequacy of legal relief, in every case, must be determined upon equitable principles, applied by the equity tribunal exercising the remedial jurisdiction—yet, there are several obvious criticisms which must be made upon some of its positions, upon its general reasoning, and upon its conclusion. 1. In the first place, the passage is entirely *obiter*, not necessarily involved in the matters at issue, and not entering into the *ratio decidendi* of the case. The contract itself is plainly one which could not be specifically enforced. It was clearly impossible for the court to compel the plaintiff to maintain his elevator through a period of fifteen, or perhaps, thirty years, so as to handle all the grain the defendants might transport, and, upon the principle of mutuality, it could not, therefore, be enforced against the defendants. The question of specific performance was, therefore, out of the case at the very beginning. Again, it is plain, and so the court holds, that damages were not only an adequate remedy, but that they could be easily computed. In fact, all the plaintiff sought to obtain was compensation for handling the grain—they asked a specific performance, by defendants, only that they might earn that compensation, and this compensation would be ascertained at law in exactly the same manner, and upon the same proofs, as in equity. If the measure of damages was the price per bushel, as stipulated in the contract, the number of bushels transported by defendants, within the time, would, at once, furnish the desired sum. If additional profits were allowed, they would be computed upon the same basis, and the same evidence, in both courts. It is obvious, therefore, that the case was, as the court treated it, and expressly declared, a simple action at law, to recover damages, which the parties had improperly brought on the equity side, and all that was said, concerning the equitable jurisdiction to decree a specific performance, was irrelevant and immaterial. 2. In the second place, the conclusion, that the question of adequacy or inadequacy of the legal remedy of damages, in "each case, must be determined upon its *own facts*," does not follow, as a legitimate nor just inference, from the premise, that "it is impossible to state a general rule as to the power of equity to enforce a specific performance of contracts respecting personal property, choses in action, and personal services," nor from the very general nature of the definitions cited by the learned judge. It has never been supposed, that the doctrine of specific performance, as applied to all contracts, except those relating to real estate, could be expressed by one single, general formula, which should furnish any aid in the decision of actual cases. The inherent differences in the nature of contracts concerning personal property, choses in action, and personal services, prevent such a comprehensive statement in a practical form, and no judge or text writer has ever been foolish enough to attempt it. But this fact is not inconsistent with the establishment and recognition of several definite rules, which determine the question of the adequacy or inadequacy of damages in many subordinate classes of contracts, and which, therefore, furnish the principles which regulate the courts in administering the equitable remedy to those

their contract, considered as an individual separated from others of the same class, but by those relations and terms in the contracts generally of the class to which the individual belongs. In other words, a particular contract, the subject of judicial action, is not treated as a single isolated case, and the inquiry is not whether from its special provisions, or from the peculiar situation of its parties, the remedy of damages would be adequate or inadequate; it is rather treated as one of a class, and the inquiry is whether, in agreements generally of that kind, the terms or the relations of the parties are such that the legal remedy of damages is adequate or inadequate. For example, in a contract for the sale of land, where the vendor had received the price and had refused to convey, it might possibly be proved, with absolute certainty, that, from the peculiar condition of the land in question, or of the real estate market, or of the purchaser himself, the value of the property in money would be altogether more advantageous to him than the tract *in specie*, for which he had bargained. No matter how clear the proof in this individual case, the court would not hesitate

classes. It is a mistake to say, that, in deciding upon the adequacy of the legal remedy for all contracts, except those concerning lands, "there is no fixed rule to guide us, other than *this* one—that the remedy must be indispensable to justice." It has been shown, in the preceding sections, that the doctrine of specific performance recognizes no differences inhering in their subject-matter, between contracts relating to real estate and those relating to personal estate, or personal services, but the same general principle is applied to all alike. It has, also, been shown—and the fact will be further illustrated in subsequent portions of this volume—that with respect to many, and I may truly say most, classes and species of personal contracts, the rules which determine the adequacy or inadequacy of the legal remedy, and the consequent applicability of the equitable remedy, are as well settled, as certain, and as precise, as those which determine the same matters with respect to contracts concerning lands. 3. Finally, waiving the foregoing criticisms, the language of Mr. Ch. J. Beck, although somewhat loose, is not, when correctly interpreted, and read under the limitations furnished by the facts of the case—which must always be put upon the general expressions found in a judicial opinion—inconsistent with the positions of the text. He does not claim that the question, as to the sufficiency of the legal remedy, must be decided upon the facts and circumstances of each particular case of contract, treated as an individual instance, and without reference to the *class*, kind, or species of agreements to which it belongs. He does not mean, for example, that an ordinary contract for the sale of merchandize should be specifically enforced against the seller, because, it appears, that he is insolvent, and cannot pay the damages, or that, from the peculiar situation of the purchaser, the goods, *in specie*, would be more advantageous to him than their value in money. The learned judge admits that each case must be decided "by the application of equitable principles," and that the "justice" to be promoted is the somewhat artificial justice dispensed and formulated by the decisions of equity tribunals. These expressions, although loose, really admit the operation of all the special rules which have been settled by the courts, and described in the text.

for a moment, *on such grounds*, to decree a specific performance if demanded, because the doctrine is settled that in contracts for the purchase and sale of land, as a class, damages are inadequate, and this general rule would not yield to the special circumstances of a particular case. On the other hand, in a contract for the sale of ordinary merchandise, the purchaser might show his peculiar situation which rendered the goods greatly more advantageous to him than their value in money,—as, for example, his personal need of the articles and his distance from a market which would enhance the cost of procuring others of the same kind, and yet he could not, by paying or tendering the price, compel a specific performance and a delivery of the goods, because the rule is settled that in contracts for the sale of ordinary merchandise and other similar chattels, the legal damages are adequate. These supposed cases sufficiently explain my meaning. In administering the equitable remedy of specific performance, and so far as it depends upon the adequacy or inadequacy of legal damages, the courts are guided by considerations which have respect to classes of contracts having the same or similar qualities and incidents connected with their subject-matter, terms, or parties, and rules are established with greater or less certainty, precision, and comprehensiveness for each class separately. It should be observed, in concluding this discussion, that the adequacy or inadequacy of the legal remedy, in all cases, must be determined upon equitable principles. As equity alone can administer the relief of specific performance, equity alone can decide whether the conditions for its exercise exist in any contract; and, in making the decisions, must apply the principles and doctrines which are recognized as the basis of its own jurisdiction, and not those which control the action of another forum.(1)

SEC. 28. *Second. The impracticability of a legal remedy.* This second ground of the equitable jurisdiction includes two cases, (1) where, from the lack of some legal formality or condition in the contract, no action at law can be maintained; and (2) where, from some peculiar feature of the contract, inhering either in its subject-matter, in its terms, or in the relations of its parties, it is impossible to arrive at a legal measure of damages at all; or at least with any sufficient degree of certainty, so that no real compensation can be obtained by means of an action at law. Both these cases may be combined under the single designation—*the impracticability of damages as a remedy*. Several species of contracts, referable to the first ground as well as to this,

(1) See per BECK, C. J., in *Richmond v. Dubuque, etc., Railroad*, 33 Iowa, 480, 481.



have already been discussed in preceding sections, and need, therefore, only to be mentioned in the present connection without any extended description. I shall proceed to enumerate, and, as far as necessary, describe the various kinds of agreements which are specifically executed, because a legal remedy of damages is impracticable.

SEC. 29. The first general class embraces those contracts in which the plaintiff, by reason either of some extrinsic circumstance, or of his own default, has not performed, or even cannot perform, all the conditions on his part necessary to be performed, in order that an action at law may be maintained thereon; but which, nevertheless, a court of equity regards as binding and will enforce. The law holds parties strictly to the very terms of their engagements, and demands from the plaintiff an exact performance of all the stipulations on his part which are essential to a recovery, or else no legal right of action accrues to him. Equity distinguishes between those terms and stipulations which are of the essence of the contract, and those which are not of the essence, and does not permit the defendant to set up a breach of the latter as complete bar to all relief, or as a sufficient reason for wholly refusing to execute the agreement. In these cases no action at law can be maintained; but equity, if the contract is otherwise a proper one, will decree a specific performance with such compensations or allowances as may be found just to the parties. The principle was thus stated by Lord ELDON: "Lord THURLOW used to refer the doctrine of specific performance to this—that it is scarcely possible that there may not be some small mistake or inaccuracy—as, that a lease held in trust represented to be for twenty-one years may be for twenty years and nine months—some of these little circumstances that could defeat an action at law, and yet lie so clearly in compensation that they ought not to prevent the execution of the contract." (1) Even when the partial failure or inability to perform, and the consequent loss of a legal remedy, result directly from the default of the plaintiff himself, the contract will be specifically enforced, if the relief is demanded by equitable principles; as, for example, when the plaintiff has performed substantially, but not with such exactness in respect to all the terms that he could maintain an action at law. (2) In this general class are included all the cases

(1) *Mortlock v. Buller*, 10 Ves. 305, 306; and see *Stewart v. Alliston*, 1 Mer. 26, 32.

(2) *Davis v. Hone*, 2 Sch. & Lef. 341, 347; *Voorhees v. DeMeyer*, 2 Barb. 37; *McCorckle v. Brown*, 9 Sm. & Marsh. 167; *Coale v. Barney*, 1 Gill & John. 324; *Shaw v. Livermore*, 2 Greene Iowa, 338.

where, from a partial failure by the plaintiff, a specific execution is decreed with compensation on abatement.

SEC. 30. The second general class embraces contracts which are not valid in law—that is, which the law does not treat as contracts at all; but which equity regards as binding in conscience, and enforces by its remedy of specific performance. The legal invalidity may result from the non-observance of some statutory requirements concerning the mode of making the agreement, or from certain doctrines of the common law, irrespective of statute, affecting its terms or its subject-matter. By far the most numerous and important species of contracts contained in this class are those which, being void at law under the statute of frauds, have been part performed by the plaintiff, and will, therefore, be wholly executed *in specie*, at his suit and for his benefit, by courts of equity. The theory upon which equity proceeds in administering its specific remedy in such cases is, that the defendant having permitted the plaintiff to treat the agreement as binding, and to do positive acts based upon such assumption, it would be a fraud in him to repudiate his undertaking, and to set up the statute as an obstacle in the way of its completion. The doctrine is most frequently applied to contracts for the sale of land which have been part performed by the purchaser, but is not confined to them; it is extended to those contracts concerning things personal or things in action which the statute of frauds requires to be in writing, but which, when verbal, are in their nature susceptible of a part performance; as, for example, verbal ante-nuptial agreements for the settlement of personal estate.<sup>(1)</sup> In order that the court may exercise its jurisdiction and specifically enforce a verbal contract void by the statute, which has been part performed, the agreement must be of such a nature, in respect to its

(1) *Gough v. Crane*, 3 Md. Ch. 119; 4 Md. 316. Contracts for the sale of chattels, or things in action, do not fall within this principle, because the very acts which would amount to the part performance of the verbal stipulation, render it valid at law by the express provisions of the statute itself, and there is no necessity of any equitable interposition—such as a part payment in whole or in part of the price, and receipt and acceptance in whole or in part of the chattels. The jurisdiction where contracts void by the statute of frauds have been part performed, will be fully examined in the sequel, and I now cite a few cases only to illustrate the propositions of the text. *Buckmaster v. Harrop*, 7 Ves. 346, per Sir WILLIAM GRANT; *Mundy v. Jolliffe*, 5 My. & Cr. 177, per Lord COTTENHAM; *London, etc., R'y Co. v. Winter*, Cr. & Ph. 57; *Earl of Lindsey v. Great Northern R'y Co.*, 10 Ha. 664, 700; *Kirk v. Bromley Union*, 2 Phil. 640; *Phillips v. Thompson*, 1 John. Ch. 131; *Lord v. Underlunk*, 1 Sandf. Ch. 46; *Jervis v. Smith*, 1 Hoff. Ch. 470; *Annan v. Merritt*, 13 Conn. 478.



terms and its subject-matter, that the court could decree its specific execution if it were in writing.(1)

SEC. 31. There are agreements which the common law, by virtue of its own doctrines, irrespective of statutory regulation, treats as invalid, as not contracts, and for which it furnishes no remedy; but which equity, in the application of its conscientious principles, considers as binding, and enforces by awarding its relief of a specific performance. The following are some examples: An agreement respecting the disposition of a possibility or hope of succession is not valid at the common law, so that if an heir, during the life-time of his ancestor, should assign his expectancy, or agree to convey the property, the contract would be legally void, although he should afterwards inherit or succeed to the estate.(2) Equity, however, will hold such

(1) *Kirk v. Bromley Union*, 2 Phil. 640. Mr. Fry states this doctrine much broader, as follows: "The agreement must be of such a nature that the court would have had jurisdiction in respect of it, in case it had been in writing. When the court has jurisdiction in the original subject-matter, viz: the contract, the want of writing, will not deprive the court of it where there is a part performance. But the want of writing cannot itself be made the ground of jurisdiction; for then, all parol contracts, which the statute of frauds requires to be in writing, might be enforced in equity when there was a part performance." Fry Sp. Perfm. p 178 (marg. page), § 392. The case cited does not, *on its facts*, involve such a broad conclusion; it only insists that a verbal contract do work and labor, building, etc., part performed, could not be specifically enforced, because it could not be if it was written. I think the proposition is too broad, and is based upon a mistaken notion of the foundation of the rule. It seems to me equity *does* acquire jurisdiction for the very reason that there is no remedy at law, and applying other equitable principles, it is inequitable for the party to set up and rely upon the legal invalidity. Why, then, does not the equitable remedy extend to *all* contracts void by the statute of frauds which have been part performed? It should be remembered, that the statute only embraces a few classes of contracts, viz: those containing land; those for sale of chattels and choses in action, over \$50; those not to be performed within a year; those in contemplation of marriage, and those of guaranty. I have already explained why the second class do not fall within the equity remedy, viz: because the only possible acts of part performance *make them valid at law under the statute*. In regard to other contracts it is to be observed, (1), that, with respect to many of them, it is impossible that there should be any acts of part performance which can satisfy the requirements of the equitable doctrines on the subject, viz: acts done by the plaintiff by virtue of the contract, treating it as a subsisting agreement, and of such an intrinsic character that he cannot be restored to his former position, so that it would be a virtual fraud upon him to assert the invalidity of the agreement; (2), that all other verbal contracts, which may be part performed, and which, nevertheless, equity will not specifically enforce, are of such a nature that a specific performance would be impossible at all events, even if in writing. It is abundantly settled that verbal contracts concerning personal property, part performed, *may* be specifically enforced, if of such a nature that an enforcement is practicable.

(2) *Jones v. Roe*, 3 T. R. 88, 93.

contracts to be binding, and decree their specific execution, if they are free from fraud, over-reaching, and other objections which would generally prevent all equitable relief.(1) Another case is that of agreements to assign things in action, which are enforced in equity, although at the common law choses in action are not assignable, and the assignee acquires thereby no title which he can assert in a legal action.(2) Still another case is that of executory agreements made between a man and woman who afterwards marry, and which, for that reason, become void at the common law, but which equity may specifically execute against the husband or wife, as the case may be, at the suit of the other.(3) The last example which I shall mention is the case of contracts made by an owner to convey his land at some future day named, and he dies before the time for completion arrives. At the common law the contract is thus rendered impossible, and no action can be maintained upon it. The administrator cannot convey, because he acquires no interest in the land, and no legal obligation devolves upon the heir. Equity, however, enforces a specific performance upon the heir.(4) Legislation, in many of the states of this country, has modified the legal dogmas upon which some of the foregoing cases of equitable relief were originally based, and have wholly or partially removed the invalidity which existed at the common law. In nearly all the states all things in action, except claims to damages for personal torts, and a small class of contracts of a specially personal nature, are assignable, so far, at least, that the assignee can sue at law upon them in his own name. Contracts made between men and women, in contemplation of marriage, are declared to remain in full force and effect between the parties after their marriage in New York.(5) In many states the heirs of a vendor, adult

(1) *Wiseman v. Roper*, 1 Rep. in Ch. 154; *Beckley v. Newland*, 2 P. Wms. 182; *Hobson v. Trevor*, 2 P. Wms. 191; *Wright v. Wright*, 1 Ves. Sen. 409; *Wethered v. Wethered*, 2 Sim. 183; *Hyde v. White*, 5 Sim. 524; *Lyde v. Mynn*, 1 My. & K. 693; *Alexander v. Duke of Wellington*, 2 R. & My. 35; *Houghton v. Lees*, 1 Jur. (N. S.) 862; *Lewis v. Madisons*, 1 Munf. 303; *Price v. Winston*, 4 Munf. 63. In some of these cases the succession was by descent; in others by will.

(2) See cases cited *ante*, § 20.

(3) *Cannel v. Buckle*, 2 P. Wms. 242; *Acton v. Acton*, Prec. in Chan. 237; *Gould v. Womack*, 2 Ala. 83; *Crosthwaite v. Hutchinson*, 2 Bibb. 407.

(4) *Milnes v. Gery*, 14 Ves. 403, in arguments of counsel; *Glaze v. Drayton*, 1 Dessau. 109; *Wilkinson v. Wilkinson*, 1 Dessau. 201; *Saunders v. Simpson*, 2 Har. & John. 81, where a contract to convey was enforced against devisees of the vendor; *Newton v. Swazy*, 8 N. H. 9.

(5) Laws of N. Y. 1849, ch. 375, § 3.

or infant, are made liable to fulfill his contracts to convey, if they have inherited the lands; and sometimes a special summary proceeding, for compelling a specific performance against the heirs, has been given by statute in addition to the more formal suit in equity.(1)

SEC. 32. To the same general class may be referred, I think, a peculiar case, which has arisen in England, under the statutes giving railway and other companies compulsory power to take the land of private owners for their own public uses — “the Lands Clauses Consolidation Act.” When a notice to treat for certain land, as prescribed by the statute, has been served on the owner by the company — at all events, when, in pursuance of such notice, the price to be paid for the land has been fixed by the arbitrator — a relation, having all the effect of a contract in equity, at once arises between the parties. No acceptance by the owner is necessary, since he has no power to refuse, and, by virtue of the statute, he and the company acquire the rights and obligations of vendor and purchaser. Although there is clearly no *contract* in this transaction, since there is no mutual assent, yet equity treats it as a contract, and will enforce a specific performance against either of the parties at the suit of the other.(2) Under the analogous statutory means for acquiring land by the right of eminent domain in the United States, it is settled that no such relation between the owner and the corporation arises from the commencement or prosecution of the proceedings. The owner acquires no rights against the corporation to compel it to proceed; its acts are tentative, and it can entirely abandon the proceedings at any time prior to the order of the court confirming the report of the commissioners, or of the jury, and directing the payment of the amount awarded for compensation and damages, and perhaps at any time

(1) See the subsequent section on this subject. Ordinarily an heir is not compelled to bind himself by personal covenants when executing the contract to convey made by his ancestor. See *Hill v. Ressegieu*, 17 Barb 162.

(2) *Walker v. Eastern Counties Ry. Co.*, 6 Ha. 594; *Doo v. London and Corydon Ry. Co.*, 1 Railw. Cas. 257; *Stone v. Commercial Ry. Co.*, 4 My. & Cr. 122; *Reg. v. Birmingham, etc., Ry. Co.*, 15 Q. B. 634, overruling *Brocklebank v. Whitehaven Junction Ry. Co.*, 15 Sim. 632; *Harding v. Metropolitan Ry. Co.*, L. R. 7 Ch. 154; *Harding v. Metropolitan Ry. Co.*, 20 W. R. 321; *Doherty v. Waterford, etc. Ry. Co.*, 13 Ir. Eq. R. 538, per Ld. Chan. BRADY. And see on this subject *Adams v. Blackwall Ry. Co.*, 2 McN. & G. 118; *Morgan v. Milman*, 3 De G., M. & G. 36, per KNIGHT BRUCE, L. J.; *Leominster Canal Co. v. Shrewsbury, etc., Ry. Co.*, 3 K. & J. 654; 3 Jur. (N. S.) 930; *Inge v. Birmingham, etc., Ry. Co.*, 3 De G., M. & G. 658; 1 Sm. & G. 347; *Regent's Canal Co. v. Ware*, 23 Beav. 575; *Douglass v. London & N. W. Ry. Co.*, 3 K. & J. 173.

before the actual payment or taking possession of the land.(1) Even when the rights of the parties, the one to the land and the other to the money awarded, have been fixed by means of the statutory proceedings, they are not enforced in equity by a suit for a specific performance. When, however, the corporation has taken possession of the land without payment of the damages awarded, the owner has, in some states, a vendor's lien, which he may enforce, in the usual manner, by an equitable action. If, instead of resorting to the special statutory proceedings for acquiring title, the corporation enters into an ordinary contract with the owner for the sale and purchase of the land, a court of equity could decree a specific performance against either party, as in the case of all similar agreements.

SEC 33. A third class, or, more correctly, group, consists of contracts concerning a subject-matter which would admit a sufficient remedy in damages, but which are so connected with circumstances and incidents, or are so incomplete in their terms, that a common-law action upon them cannot, perhaps, be maintained, and which, nevertheless, equity considers as binding, and enforces by its own remedy of specific performance. As the interposition of equity here depends upon the form and incidents, and not upon the subject-matter, these agreements may be of various kinds. The following are instances: An agreement for the purchase of timber was not the final contract, in form, between the parties, but was to be made complete by subsequent writings. The remedy for its breach, by an action at law, being doubtful, on account of this incompleteness, the court of chancery decreed its specific execution.(2) Contracts for the purchase of a debt or other thing in action, when the plaintiff does not acquire the legal title so as to enable him to sue at law, are, on the ground above stated, among others, enforced in equity.(3) At an early day, it was held that equity would never interfere to specifically execute a contract, for the breach of which an action at law for damages could not

(1) This is the settled doctrine under the forms of statutes ordinarily existing. See *Stacey v. Vt. Cent. R. R.*, 27 Vt. 39, and cases cited; *Baltimore, etc., R. R. v. Nesbit*, 10 How. U. S. 395; *In re Commissioners of Wash. Park*, 56 N. Y. 144; 1 *Redfield on Railways*, 256, § 3 (5th ed).

(2) *Buxton v. Lister*, 3 Atk. 383, per Lord HARDWICKE. This doctrine does not extend to all incomplete contracts, but only to those so technically incomplete as to render an action at law doubtful, but not so incomplete as to prevent their enforcement in equity.

(3) *Wright v. Bell*, 5 Pri. 325; *Doloret v. Rothschild*, 1 S. & S. 590. See *West v. Wayne*, 3 Mo. 16; *Wheeler v. Clinton Canal Bk.*, *Harring. Ch.* 449; *Philips v. Thompson*, 1 Johns. Ch. 132.

be sustained.(1) This restriction no longer prevails; and, in many cases, where no action could be maintained at law for damages, the agreement will be specifically enforced in equity.(2)

SEC. 34. The impracticability of the legal remedy, in the three foregoing classes, consists in the fact, that no action at law can be maintained upon the agreements, which, being binding in conscience, are, nevertheless, enforced by courts of equity. There are other cases, in which an action at law may be brought, but can give no practical relief, because there is no basis upon which damages can be ascertained with certainty; in other words, there can be no legal measure of damages, but they must, of necessity, be a matter wholly of conjecture and assumption.(3) This lack of any certain basis upon which to calculate the damages according to legal rules, may inhere in the subject-matter of the agreement, or in the special nature of its terms.

(1) *Bettesworth v. Dean and Chapter of St. Paul's*, Sel. Cas. in Ch. 66, 69.

(2) *Lennon v. Napper*, 2 Sch. & Lef. 682; *Cannel v. Buckle*, 2 P. Wms. 242; *Getchell v. Jewett*, 4 Greenl. 350; *Andrews v. Andrews*, 28 Ala. 432; *Story Eq. Jur.* § 741.

(3) In *Palmer v. Graham*, 1 Pars. Eq. 476, 479, per KING, P. J., this doctrine was clearly and forcibly stated: "That plaintiff could have maintained an action at law for this breach, cannot be doubted. But, has he not also the more effective remedy, in this court, of compelling the specific execution of the contract, and of restraining defendant, by injunction, from any further violation of it? It is true, that, as a general rule, equity will not entertain jurisdiction for the specific execution of agreements respecting things merely personal in their nature. Yet, this rule is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy. But in cases where there exists an utter uncertainty in, any calculation of the damages arising from the breach of a contract personal in its nature, where the measure of damages is purely conjectural, equity will intervene, because, though there may exist a remedy at law, yet that remedy is inadequate and insufficient. The nearest analogies to a case like the present are to be found in bills brought to prevent a vendor from setting up a trade in the vicinity of a place where he had formerly carried on that trade, the good-will of which he had sold, under an agreement not to establish a similar trade within certain defined limits. In such cases, equity has enforced the specific execution of the contract, by enjoining the vendor against setting up the trade within the prescribed limits, on the ground of the inadequacy of an action at law to give the party aggrieved a full and perfect remedy for such a breach of good faith. Citing *Harrison v. Gardner*, 2 Madd. 198; *Williams v. Williams*, 2 Sw. 253. In each of these cases, an action at law could have been entertained; equity, however, entertained jurisdiction, because it was only by compelling specific performance of the agreement that plaintiff could obtain complete and perfect justice. In principle, we can perceive no distinction between these cases and the present. Although an action at law might lie, yet such an action is subject to all the objections of inadequacy and insufficiency, and the measure of damages therein would be equally uncertain and conjectural, as in the cases cited, where equity has given relief, because of the want of fullness in the common-law remedies."

I shall simply enumerate the most familiar and illustrative examples. To the first head—of subject-matter—may be referred all contracts concerning unique and precious articles, heir-looms, rare paintings, old furniture, and the like, in which there is no market price to furnish a criterion, nor any other means of estimating the *pretium affectionis*, which constitutes the real value to the owner.(1) Also, contracts for the delivery of deeds, other muniments of title, and instruments in writing, whose value to the owner might be priceless, but is clearly beyond the competency of a jury to decide by the application of certain legal rules;(2) and many contracts for the assignment and transfer of certain peculiar things in action, in which the damages for a breach would depend upon contingencies, and be entirely conjectural.(3) To the second head—the special nature of the terms—must be referred a variety of different agreements; among others, contracts in which acts are to be done, or articles delivered, by one party, and payments are to be made by the other, in installments, at stated times, through a number of years, and where, to compel the plaintiff to accept a present sum, by way of damages, for a non-performance, would be forcing him to sell his expected profits for a price wholly conjectural;(4) contracts by artists, actors, singers, and others having special skill, or knowledge, to render personal services involving the use of such skill or knowledge, which are analogous to agreements concerning unique and precious chattels, there being no customary market price, nor other means, of ascertaining certain damages;(5) and undertakings not to do certain specified acts, such as not to carry on a trade, not to build, or not to build above a fixed height, not to ring a bell except at certain hours, for the breach of which pecuniary compensation would be purely guess-work and assumption;(6) contracts to erect defined structures, for the benefit of the plaintiff, upon land conveyed to the defendant, where the plaintiff would have no means of ascertaining the cost by performing the work himself, and thus fixing upon the actual damages resulting from a breach.(7) The foregoing instances are sufficient to illustrate and establish the doctrine, that equity may interpose and specifically enforce a large

(1) See cases cited, *ante*, § 12 n. (1)

(2) Cases cited, *ante*, in § 13, n. (1)

(3) Cases cited, *ante*, § 20.

(4) See cases cited, *ante*, § 15.

(5) See *ante*, § 12.

(6) *Ante*, § 24.

(7) *Ante*, § 23. See, also, for another case, where equity has enforced an agreement, because a common-law court cannot, by its form of judgment, do justice to all the parties; *Beech v. Ford*, 7 Ha. 208.



variety of agreements, where the measure of legal damages is purely conjectural, and the legal remedy of compensation is, therefore, wholly impracticable. These cases have also been, and generally are, cited to show that equity has jurisdiction where damages are *inadequate*; but the inadequacy here consists in the impossibility of arriving at any definite amount of damages, by means of the fixed and certain rules which govern the common-law methods of administering justice.

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## SECTION II.

### *The discretionary character of the remedy.*

SECTION 35. Having thus described the intrinsic nature of this equitable remedy as ancillary and supplementary to the ordinary legal relief of debt or damages, I shall next discuss, in a like general manner, the other important attribute mentioned in the introductory chapter—its discretionary character. Even where a contract belongs to a class susceptible of enforcement, the right to its specific performance is not absolute, like the right to recover the legal judgment. The granting this equitable remedy is a matter of discretion; not, indeed, of an arbitrary, capricious discretion, synonymous with the mere pleasure of the judge; but of a sound, judicial discretion, controlled by established principles of equity, and exercised upon a consideration of all the circumstances of each particular case. Where, however, the agreement is in writing, is certain in its terms, is fair and just in all its provisions, is for a valuable consideration, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance, as for a court of law to award a judgment of damages upon its breach. This is the ordinary language as repeated by judges and text-writers. I propose to examine it with care, to analyze and compare the decisions, and to ascertain, if possible, the true nature and exact extent of this “discretion,” which is constantly attributed to the jurisdiction. As a preliminary, I have collected in the foot-note extracts from the judgments of several able courts, both ancient and modern, which will exhibit the judicial opinion in all its different forms of expression.(1)

(1) *Radcliffe v. Warrington*, 12 Ves. 332, per Lord ERSKINE: “The jurisdiction is not compulsory upon the court, but the subject of discretion. The question is not what the court must do, but what it may do, under the circumstances, either

SEC. 33. In determining the real force and effect of these judicial opinions, and in ascertaining the exact nature of the so-called "discretion" exercised by the courts, it is necessary, in the first place, to

\*exercising the jurisdiction by granting the specific performance, or abstaining from it." *Joynes v. Statham*, 3 Atk. 388, per Lord HARDWICKE: "The constant doctrine of this court is, that it is in their discretion whether in such a bill they will decree a specific performance, or leave the plaintiff to his remedy at law;" and in *Underwood v. Hitchcox*, 1 Ves. Sen. 279, the same chancellor said: "The rule of equity in carrying agreements into specific performance is well known, and the court is not obliged to decree every agreement entered into, though for a valuable consideration, in strictness of law, it depending on the circumstances." The subject was carefully considered in the late case of *Willard v. Tayloe*, 8 Wall. 557. The suit was by the vendor to enforce a contract empowering him to purchase leased property at the expiration of ten years, for a price which was conceded to be perfectly fair and reasonable. The objection raised was that in the meantime the war had changed all the circumstances, the property had very largely increased in value, and the legal tender notes, with which the plaintiff proposed to pay, were very much depreciated, compared with gold. The opinion of the court, per FIELD, J., after holding that the contract was legal, binding in law, and perfectly fair when made, proceeds (p. 565): "When a contract is of this character, it is the usual practice of courts of equity to enforce its specific execution, upon the application of the party who has complied with its stipulations on his part, or has seasonably and in good faith offered, and continues ready to comply with them. But it is not the invariable practice. This form of relief is not a matter of absolute right to either party; it is a matter resting in the discretion of the court to be exercised upon a consideration of all the circumstances of each particular case" [citing several leading cases] (p. 566). "It is true the cases cited, in which the discretion of the court is asserted, arose upon contracts in which there existed some inequality or unfairness in the terms, by reason of which injustice would have followed a specific performance.\* But the same discretion is exercised where the contract is fair in its terms, if its enforcement, from subsequent events, or even from collateral circumstances, would work hardship or injustice to either of the parties," [citing *City of London v. Nash*, 1 Ves. Sen. 12; *Faine v. Brown*, cited in *Ramsden v. Hylton*, 2 Ves. Sen. 306] (p. 567): "The discretion which may be exercised in this class of cases is not an arbitrary or capricious one, depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and settled principles of equity. No positive rule can be laid down by which the action of the court can be determined in each case. In general, it may be said that the specific relief will be granted, when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice; and that it will be withheld when, from a like view, it appears that it will bring hardship or injustice to either of the parties. It is not sufficient to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing desired may be perfect. It must, also, appear that the specific enforcement will work no hardship or injustice; for if that result should follow, the court will leave the parties to their remedies at law, unless the granting of the specific relief can be accompanied with conditions that will obviate that result. If that result can be thus obviated, a specific performance will, generally, in such cases, be decreed conditionally. It is the advantage of a court of equity, as

distinguish between those expressions which are purely *obiter*, and those which are not. Such general language must be tested by and limited to the particular facts of the various cases in which it is

observed by Lord REDESDALE, in *Davis v. Howe*, 2 Sch. & Lef. 348, that it can modify the demands of parties according to justice, and when, as in that case, it would be inequitable, from a change of circumstances, to enforce a contract specifically, it may refuse its decree, unless the party will consent to a conscientious modification of the contract, or what would generally amount to the same thing, take a decree upon condition of doing or relinquishing certain things to the other party." Specific performance was, therefore, refused, unless the vendee would pay the price and interest in gold, but decreed on condition that he paid in that manner. It will be seen, therefore, that the discussion on the subject of "discretion" formed a most important part of the *ratio decidendi*—in fact, was the very ground of the decision. *Marble Co. v. Ripley*, 10 Wall. 339. In this case specific performance was asked of a peculiar contract, intended to run through many years and perhaps indefinitely, which was fair and equitable when made. The relief was objected to, among other grounds, because, by a change in circumstances, the agreement had become one-sided, very advantageous to the party seeking the decree, and very burdensome to the party opposing. On this point the court, per STRONG, J., said (p. 356): "The next question is, whether Ripley was entitled, upon his cross-bill, to a decree against the Marble Company for a specific performance of the contract. The company urge that the contract, though supposed to be fair and equal when made, has in the lapse of time, and by the operation of unforeseen causes, arising from changed circumstances, become exceedingly unfair, unreasonable, and unconscionable, so that a decree for its specific performance would tend to their oppression and ruin. \* \* \* It is by no means clear that a court of equity will refuse to decree the specific performance of a contract fair when it was made, but which has become a hard one by the force of subsequent circumstances, or changing events." Cites Fry, p. 116, ch. 6, that the hardship must be judged of at the time the contract was made. "Judge STORY, indeed, states the rule somewhat differently (§§ 750, 776), and there are some cases that support his statements; but the rule, as stated by Fry, must be applicable to contracts that do not look to completed performance within a defined or reasonable time, but contemplate a continuous performance, extending through an indefinite number of years, or perpetually." The relief prayed for was refused on other grounds, so that these remarks were unnecessary to the decision. On another point he says (p. 357): "There are other objections to a decree for a specific performance in this case, which are more serious. Such a decree is not a matter of right. It rests in the sound discretion of the court, and generally will not be made in favor of a party who has himself been in default. \* \* \* Applying these principles to the case in hand, it would appear that the conduct of the cross-complainant has not been such as to justify the court in decreeing a specific performance at his suit against the Marble Company. Without relying upon his alleged unfounded claims set up from time to time, etc., etc.; his unlawful and unwarranted entry and ouster of the Marble Company was such an invasion of the contract as leaves him no standing as a complainant asking for its specific performance in a court of equity." *Lowry v. Buffington*, 6 W. Va. 249, 255, per HAYMOND, J.: "Applications to the court to compel specific performance, are addressed to its discretion; but it is not an arbitrary or capricious discretion, but a sound, judicial discretion, regulated by the established principles of

employed, and the judgments actually pronounced in those cases. Many of the passages quoted in the foot note had no relevancy whatever to the matters in issue, or to the decisions finally made. I shall

the court." This was a mere *dictum*, as the relief was granted, and the only question in the case was one of fact, whether the alleged contract had been made. *Fish v. Lightner*, 44 Mo. 268, 272, per CURRIER, J.: "Petitions for a specific performance of contracts are addressed to the sound and reasonable discretion of the court, which withholds or grants relief according to the circumstances of each particular case, when general rules and principles fail to furnish any exact measure of justice between the parties." *Fish v. Leser*, 69 Ill. 394. Defendant, a weak-minded man, ignorant of business, just after the great Chicago fire, while he was much frightened thereby, was induced, by repeated solicitations of a person, to sign a writing authorizing that person, as his agent, to sell certain lots in Chicago for \$21,000; they were worth \$30,000. and were rapidly increasing in value; extensive improvements were about to be commenced on adjoining lots, which would improve the value of the property. All these facts were well known to business men, but not to defendant, and he was not informed of them by the person who got the authority to sell, who was also agent for the buyers throughout the whole transaction. A specific performance against the vendor was refused. The court, per CRAIG, J. (p. 395), said: "Courts of equity will not always enforce the specific performance of a contract. Such applications are addressed to the sound, legal discretion of the court, and the court must be governed, to a great extent, by the facts of each case as it is presented. Specific performance will not be decreed unless the agreement has been entered into with proper fairness, and without misapprehension, misrepresentation, or oppression. The contract must be fair, equitable, and just, and the complainant should be prepared to show that it will not be unjust or oppressive on the defendant to have the contract enforced." The court did not, in fact, decide this case upon any *discretion*, for they subsequently held that the contract could be set aside as fraudulent against the vendor, because his agent was also the secret agent of the purchaser. *Stone v. Pratt*, 25 Ill. 25. This was a suit by an assignee of a part of a land contract against the vendor. The court, per CATON, Ch. J. (p. 34), said: "This is a bill for the specific performance of an agreement by one who at law has no claims whatever upon the defendant—at least in his own name. Such a bill is always addressed to the sound discretion of the court, which must be governed by the circumstances of each case as it is presented. In *Lear v. Chouteau*, 23 Ill. 39, this court said: "In order to induce a court of equity to enforce specifically a contract, it must be founded on a good consideration; it must be reasonable, fair, and just. If its terms are such as our sense of justice revolts at, this court will not enforce it, though admitted to be binding at law." It may be added, that the complainant must show no oppression or unconscionable advantage, when he comes into a court of conscience asking for a remedy beyond the letter of his strict rights. He must not ask for a favor beyond his technical legal rights when he bases his claim to that favor upon a hard, oppressive, technical advantage. He must stand before the court prepared to meet its scrutiny without a blush, relying upon the advocacy of a well-regulated conscience in his favor. Such must not only be his own position, but he must show that it is not unjust or oppressive to the defendant to compel him to perform specifically. Let us examine the position of these parties. Waiving the question of the division of the contract, the complainant, before he could call on the defendant to convey to him this land,

attempt, by analyzing these opinions, and by comparing them with the facts to which they relate, and with the decrees to which they led, to reach a definite statement of the doctrine, and to ascertain the pre-

was obliged to satisfy an obligation which secured to this defendant about \$4,000. He attempts to do this not by paying him, or any one else having a right to receive the money, the actual amount due, or to become due, on the contract, but he purchases the contract at a forced sale for \$1,000. (The defendant's interest in the contract had been sold at a judicial sale, based upon some alleged clause of forfeiture). This is the extent of his merit. The defendant, by his contract with D'Wolf (the original vendee), was entitled to receive about \$4,000 before he could be asked even by D'Wolf himself to convey any portion of the premises. Now, what has he realized for this \$4,000 worth of land? Absolutely nothing. His claim or right to recover the money was sold (and upon the validity or effect of that sale we pass no opinion), to pay a forfeit. Nothing more—nothing for which he had received value. Now, all this may have been a strictly legal transaction. The defendant, by his own folly, may have frittered away his legal rights to this money or to the land, but it is not such a transaction as should induce a court of equity to throw down the legal barriers which surround the defendant, and compel him to do more, for the ease and benefit of the complainant, than the strict rule of law will give." This opinion, which was not *obiter*, but necessary to the decision made, is an admirable statement of the doctrine, and goes far towards explaining the exact nature of the "discretion," so often mentioned, and showing the true grounds upon which it rests. *Quinn v. Roath*, 37 Conn. 16. Suit against a vendor to compel a conveyance. There had been a slight delay of the plaintiff in making a payment stipulated to be made on a certain day, and this was relied upon as a defense. The relief asked was granted. Opinion by PHELPS, J. (p. 24): "Whether a specific performance of a contract shall be decreed is, in a great measure, dependant upon the exercise of a sound judicial discretion, not arbitrarily or capriciously, but reasonably, according to the circumstances of the particular case. \* \* \* Every agreement, as to time, is not of the essence of the contract, and therefore every failure by the petitioner in a literal performance does not, of necessity, furnish a sufficient defense against a bill for a specific performance; and we think no better or safer general rule, on this subject, can be prescribed than that the broken stipulation should be of such a character as to constitute a condition precedent to the petitioner's right to enforce the contract; or be such as, on its non-fulfillment without a reasonable excuse, to render in terms the contract void; or in some other manner to render it clearly inequitable, under circumstances of fraud, mistake, surprise, unreasonable delay, gross neglect, bad faith, or other manifest unconscientiousness, that the petitioner should have a decree." *McComas v. Easley*, 21 Gratt. 23, 29, 30, per CHRISTIAN, J.: "Every bill for the specific performance of a contract is an application to the sound discretion of the court. It is not a case requiring the interposition of the court *ex debito justitiæ*, but rests in their discretion upon all the circumstances of each particular case. \* \* \* Of course, the discretion to be exercised is not an arbitrary and capricious one, depending upon the mere pleasure of the court; but one which is to be exercised and controlled by the established doctrines and settled principles of equity, governed by the circumstances of each particular case. And, indeed, it is not at all in conflict with these views to say that, when a contract respecting real property is, in its nature and circumstances, unobjectionable, it is as much a matter of course for courts of equity to decree a specific perform-

cise nature of the remedial right to a specific performance—or, in other words, the real meaning and limits of the “discretionary” character so commonly assigned to it. It is abundantly settled, at the outset,

ance of it, as it is for a court of law to give damages for the breach of it.” The plaintiff in this case alleged a verbal contract for the sale of land to him; the defendant set up and proved a quite different agreement covering the same land and other matters. *Held*, that the court had the power to specifically enforce the latter, and would do so, provided the relief did not work injustice or hardship to either party. *Hale v. Wilkinson*, 21 Gratt. 75. Suit against a vendor of land; defense that the price, by reason of a change in circumstances, had become inadequate. *Held*, that inadequacy is no defense unless it is of itself evidence of fraud. *MONCURE*, P. J., after quoting the foregoing language of the last case, added, in respect to the final passage of the above extract (p. 80): “This proposition is self-evident. The law always enforces the contracts of men where they are unobjectionable. The literal and exact enforcement of a contract requires its specific execution, whatever may be the subject of such contract. Generally, specific execution of a contract, in regard to personality, will not be decreed, but the parties will be turned over to their legal remedies, because they are more convenient than equitable remedies, and damages generally afford ample and satisfactory compensation. \* \* \* Land always has, in the eye of the law, a peculiar value, and a contract for the sale and purchase of it, if unobjectionable, will, therefore, be specifically executed. In no other way can parties receive the full benefit of their contract. And no court, having jurisdiction of the subject, and being properly applied to for such relief, can withhold it but by an act of arbitrary power.” *Cooper v. Pena*, 21 Cal. 403, 411, per *CORE*, J. “It is a settled principle, that the specific performance of a contract is not a matter of course, but rests in the sound discretion of the court, upon a view of all the circumstances; and before the court will act, it must be satisfied that the contract is reasonable and equal in its operation.” *Bruck v. Tucker*, 42 Cal. 346, 353, per *WALLACE*, J.: “It is well settled, that an application made to a court of equity to obtain relief of that character [specific performance] does not proceed *ex debito justitiæ*, as an action at law, brought for the recovery of damages upon a breach of such an agreement, but is addressed to the sound discretion of the court to be determined upon all the circumstances appearing. That the contract, concerning which relief is sought, is one sufficient in point of mere legal obligation; that it is supported by a valuable consideration, paid, or agreed to be paid; that it is free from fraud, or from such a degree of imposition or surprise upon the defendant as would support an application, on his part, to set it aside entirely; these, and the like circumstances, though ordinarily indispensable, are yet far from sufficient, in themselves, as constituting a case for invoking the relief—extraordinary in its character—sometimes administered by the courts through the instrumentality of a decree for specific performance. The agreement alleged must be one which, in all its features, appeals to the judicial discretion as being fit to be enforced *in specie*, as having been obtained without any intermixture of unfairness. Hence, if it appears that the bargain, though obligatory in point of mere law, and one not to be set aside in equity, is, nevertheless, a *hard bargain*, the court will not relieve.” *Bogan v. Danghrill*, 51 Ala. 312, 314: “When a contract respecting real estate is in writing, is certain, fair in all its parts, founded on an adequate consideration, and capable of execution, a specific performance in a court of equity is as much a matter of right as damages for its breach, in a

that the remedy is not "discretionary," in the usual acceptation of the term; it is not given or withheld at the mere will and good pleasure of the judge; nor does it depend upon his own individual

court of law." *Aston v. Robinson*, 49 Miss. 348, 351, per SIMRALL, J.: "The jurisdiction of a court of equity to enforce specifically a contract, though it is said to rest in judicial discretion, yet it is exercised according to sound and fixed rules, and within certain defined limits, but is controlled largely by the circumstances of the individual case (citing *Ash v. Daggy*, 6 Ind. 259; *Griffith v. Frederick Co. Bk.*, 6 Gill. & John. 424). The requisites, upon which this equity arises, are: The performance must be necessary; there must be a valuable consideration; it must be practicable; the agreement must be certain and mutual. Ordinarily, it will not be exerted in reference to agreements about chattels, because the law esteems that ample compensation can be made in damages for a breach. The right arises where a contract, binding at law, has been infringed, and the remedy at law by damages is inadequate. The contract must be fair, and not hard and unconscionable on either party. *Daniel v. Frazer*, 40 Miss. 507." *Weise's Appeal*, 72 Pa. St. 351, 354, per THOMPSON, C. J.: "Decrees in equity, for specific execution, are not, like judgments at law, a matter of right; they are within the discretion of the chancellor, and of grace. *Miller v. Henlan*, 1 P. F. Smith, 265; *Freetley v. Barnhart*, id. 281. As a rule, whenever the equity of the party, under his contract, is not clear, or his case is unconscionable or inequitable, courts of equity refuse specific execution, and leave the party to his action at law to recover damages for the breach of the contract." This was merely a *dictum*; for the case was decided upon the single ground, that the agent, who made the contract, in the name of the defendant, acted without any authority, so that it was void even at law. *Snell v. Mitchell*, 65 Me. 48, 50, per WALTON, J.: "Such application is addressed to the sound discretion of the court. Neither party to a contract can insist, as a matter of right, upon a decree for its specific performance. The courts of law are always open to him, and, ordinarily, an action at law furnishes an ample remedy for the breach of a contract; and where such is the case, a court of equity generally declines to take jurisdiction. If a contract for the conveyance of real estate is, in all respects, fair, and free from ambiguity, and there are no insurmountable difficulties in the way of a specific performance, its performance will ordinarily be decreed. On the contrary, if the contract is unconscionable, or ambiguous, or through fraud; or mistake, or want of skill, on the part of the draftsman, does not truly embody the agreement of the parties, or if, for any other reason, the court is of opinion, that the contract is one which, in equity and good conscience, ought not to be specifically enforced, it will decline to interfere, and will leave the parties to such redress as can be obtained in an action at law. \* \* \* A court of equity will never knowingly decree an impossibility; it will never knowingly require a party, under the pains and penalties of perpetual imprisonment, to do an act which is out of his power to do." *Blackwilder v. Loveless*, 21 Ala. 371, 374, per CHILTON, J.: "The enforcement of the specific performance of contracts, in a court of equity, is not a matter of right in either party, but is a matter of discretion in the court; not, indeed, of arbitrary or capricious discretion, dependent upon the mere pleasure of the judge, but of that sound and reasonable discretion, which governs itself, as far as may be, by general rules and principles; but, at the same time, withholds or grants relief according to the circumstances of each particular case, where these rules will not furnish any exact measure of justice between the parties. The court uniformly

opinion, as to its propriety and feasibility; much less is it a matter of favor. The statement, therefore, found in a recent Pennsylvania case, that the relief is "of grace," is neither consistent with principle nor

refuses to decree a specific performance, except in cases where such decree would be strictly equitable. It requires much less strength of case to enable a defendant to resist a bill to perform a contract, than it does, on the part of the plaintiff, to maintain such bill; for, if there be any fraud or mistake, or if the bargain be hard or unconscionable, or if the specific performance would, under all the circumstances, be inequitable, the chancellor should refuse to decree the specific execution of the agreement, and leave the parties to their remedies at law. \* \* \* We will not say there was any fraud or mistake in this case; but we are satisfied that the defendant did not deal with the plaintiff on equal terms, and that, by reason of the peculiar condition in which the defendant was placed, the plaintiff was enabled to get his bond for title for a very inadequate consideration, and under the coercion of the process held *in terrorem* over him. Defendant was not in a condition to deal at arms' length with the plaintiff, nor to insist upon a fair and equitable bargain." Port Clinton R. R. v. Cleveland & Toledo R. R., 13 Ohio St. 544, 549, per GHOLSON, J.: "The specific performance of contracts rests upon the ground, that the ordinary remedy for its breach will not afford adequate relief. In some cases, this is so apparent, that a specific performance is decreed as a matter of course. Such is the case of a contract for the conveyance of real estate. In such a case, if the party has not, by some act or omission, precluded himself from relief, he may be said to be *entitled to it as a right*. For, although the court is said to have a discretion in granting or refusing a specific performance, it is not an arbitrary discretion, but a discretion to be regulated by precedent and established practice. It would, however, be going too far to say that, in *all* cases where the ordinary legal remedy would not afford adequate relief, there is necessarily a right to a specific performance." Rogers v. Saunders, 16 Me. 92, 97, per SHEPLEY, J.: "It is a matter of discretion, in the courts, whether or not to decree a specific performance, not dependent, however, upon the arbitrary pleasure of the judge, but regulated by general rules and principles. When the contract is in writing, certain, fair in all its parts, is for an adequate consideration, and is capable of being performed, it is a matter of course for a court of equity to decree performance. And performance may, in a proper case, be decreed when the party has lost his remedy at law. When its binding efficacy has been lost alone by lapse of time, courts of equity are in the habit of relieving, when time is not essential to the substance of the contract." Seymour v. De Lancey, 6 Johns. Ch. 222, 224, 225, per KENT, Chan. "It is an application to sound discretion. This has been the uniform language of courts of equity. It is not a case requiring the aid of the court *ex debito justitiæ*. It is a settled principle, that a specific performance of a contract of sale is not a matter of course, but rests entirely in the discretion of the court, upon a view of all the circumstances. A court of equity must be satisfied that the claim for a deed is fair and just, and reasonable, and the contract equal in all its parts, and founded on an adequate consideration, before it will interfere with this extraordinary assistance. If there be any well-founded objection on any of these grounds, the practice of the court is to leave the party to his remedy at law for a compensation in damages." The chancellor held, upon a review of English authorities, that mere inadequacy in the price would be a defense, since it rendered the contract unreasonable, unequal, and hard. This decision was reversed by the Court of Errors



with authority.(1) The decisions agree, with some variation in their language, but with none in the meaning, that the discretion is a judicial one, controlled and governed by the principles and rules of equity.(2)

in *Seymour v. De Lancey*, 3 Cow. 445, on the ground that mere inadequacy was not a defense; that it must be such as to be evidence of fraud. The general doctrine that the remedy is discretionary, was reiterated in substantially the same language as that employed by the chancellor. In *Lamare v. Dixon*, L. R. 6 H. L. 414, 423, Ld. CHELMSFORD said: "The exercise of the jurisdiction of equity, as to the enforcing the specific performance of agreements, is not a matter of right in the party seeking relief, but of discretion in the court; not an arbitrary or capricious discretion, but one to be governed, as far as possible, by fixed rules and principles. The conduct of the party applying for relief is always an important element for consideration." This last sentence is, of course, true. The first sentence, however, was wholly a *dictum*—a mere recital of the stereotyped formula, with which judicial opinions concerning specific performance are so often begun, without any reference whatever to its applicability to the decision which is actually made. In this case, the plaintiff sought to enforce performance of a contract, which he had made, to give defendant a lease of premises for a term of years. The court refused the relief, because the plaintiff had so violated the terms of his own agreement, that he could not even have maintained an action at law; so that he had no legal right even, and the court was not called upon to exercise any "discretion" in the matter. The only point really contested was, whether defendant had, by his acts, waived his objections to plaintiff's defaults, and the court held, as a matter of fact and of law, that there had been no waiver. The proposition quoted is not, therefore, entitled to any *authority* as part of a decision. In *Tilley v. Thomas*, L. R. 3 Ch. 61, L. J. ROLT (p. 72) said: "I think the judicial discretion which this court clearly possesses of refusing specific performance, in certain cases of agreements undoubtedly valid, ought to be carefully and sparingly exercised. Contracts ought to be performed. To break them, and to propose compensation for the breach, by damages, is not complete justice. But the discretion of this court, as to granting or refusing specific performance, has, nevertheless, been wisely as well as firmly established." It is evident, I think, that Lord Justice ROLT uses the word "discretion," to signify the power of the court to refuse a specific performance, unless all the equitable incidents are present, which create an "equity" in the plaintiff, and give him a right to the equitable relief. See, also, *Eastman v. Plumer*, 46 N. H. 464; *Mississippi, etc., R. R. v. Cromwell*, 1 Otto, 643; *Plummer v. Kepler*, 25 N. J. Eq. 481; *Sherman v. Wright*, 49 N. Y. 227; *Godwin v. Collins*, 4 Houst. 28; *Phillips v. Stauch*, 20 Mich. 369; *Burke v. Seeley*, 46 Mo. 334; *Crane v. De Camp*, 21 N. J. Eq. 414; *Merritt v. Brown*, ib. 401; *Walker v. Hill*, ib. 191; *Morganthau v. White*, 1 Sweeny, 395; *Sharps' Rifle Man. Co. v. Rowan*, 35 Conn. 127; *Cuff v. Dorland*, 55 Barb. 481; *Bowman v. Cunningham*, 78 Ill. 48; *Seaman v. Van Rensselaer*, 10 Barb. 81; *Taylor v. Williams*, 45 Mo. 80; *Humbard's Heirs v. Humbard*, 3 Head, 100; *Auter v. Miller*, 18 Iowa, 405; *Smoot v. Rea*, 19 Md. 398; *St. Paul Division v. Brown*, 9 Minn. 157.

(1) *Weise's Appeal*, 72 Pa. St. 351, 354, per THOMPSON, C. J.

(2) See *Blackwilder v. Loveless*, 21 Ala. 371, 374; *Port Clinton R. R. v. Cleveland & Toledo R. R.*, 13 Ohio St. 544, 549; *Rogers v. Saunders*, 16 Me. 92, 97; *McComas v. Easley*, 21 Gratt. 23, 29, 30; *Aston v. Robinson*, 49 Miss. 348, 351; *Quinn v. Roath*, 37 Conn. 16, 24; *Lowry v. Buffington*, 6 W. Va. 249, 255; *Willard v. Tayloe*, 8 Wall. 557, 567.

If we can ascertain just what these principles and rules of equity are, which thus govern and control the exercise of the discretion, we shall have ascertained the exact nature and limits of the discretion itself.

SEC. 37. It is very obvious that, in describing the equitable jurisdiction, and characterising it as a discretionary one, the courts are always contrasting the right to the legal remedy of damages upon the breach of a contract, with the right to the equitable remedy of specific performance. If the contract is valid and admits of no *legal* defense in law, the right of the injured party to the remedy at law is absolute, and is not affected by the circumstances. The agreement may be unfair; its benefit may be wholly on one side; it may be the result of unscrupulous conduct; it may be oppressive to the last degree upon the defendant, still the plaintiff, if he has kept himself within the strict rules of the law, is entitled to recover the full amount of his legal damages upon a breach of the contract. It is this absolute nature of the right to the legal remedy which is meant by applying to it the phrase *ex debito justitiæ* in those cases which describe the equitable remedy, by way of contrast, as *not* being awarded *ex debito justitiæ*.<sup>(1)</sup> The right to an equitable remedy, however, is never in this sense absolute, and may, therefore, when compared with the legal right, properly and to a limited extent, be called discretionary. That is, in addition to the facts, events, and relations which give rise to the certain and absolute *legal* right, there may be *other* facts, circumstances, and incidents which determine the existence of the equitable right, which modify its application, or, perhaps, entirely prevent its exercise. The phrase "within the discretion of the court" is, therefore, employed to contrast the equitable with the legal remedy; within the domain of equity jurisdiction remedies are not, in any true sense, discretionary, but are governed by the established principles and rules which constitute the body of equity jurisprudence.

SEC. 38. The remedy of specific performance is governed by the same general principles and rules which control other equitable remedies. The right to it depends upon circumstances, conditions, and incidents, in addition to the existence of a valid contract, which

(1) *Seymour v. DeLancey*, 6 John. Ch. 222, 225; *McComas v. Easley*, 21 Gratt. 23, 29; *Bruck v. Tucker*, 42 Cal. 346, 353. It must be conceded that the phrase, as thus used, is an unhappy one. It would seem that it ought to designate the equitable remedy rather than the legal one. The equitable remedy is demanded by justice; is in accordance with justice; or is due from considerations of justice; while the legal remedy is due and is given as a matter of strict law, sometimes without regard to justice.

equity regards as essential to the administration of its peculiar modes of relief. When all these circumstances, conditions, and incidents exist, the right is perfect in equity, and a specific performance is granted as a matter of course within the classes of agreements to which the jurisdiction extends. In several of the later decisions this general principle is clearly developed, and it is shown that the remedy is only discretionary, as it depends on certain equitable conditions, and that these being fulfilled, it becomes as much a matter of right as the legal relief of damages.(1) These circumstances, conditions, and incidents, as collected from various cases, are the following: the contract must be certain, unambiguous, mutual, and upon a valuable consideration; it must be perfectly fair in all its parts; free from any misrepresentation or misapprehension, fraud or mistake, imposition or surprise; not an unconscionable or hard bargain; and its performance not oppressive upon the defendant; finally, it must be capable of specific execution through a decree of the court.(2) An examination of these particulars will show, that, so far as they differ from the requisites to legal relief, they are merely a statement in part of the general principles which lie at the foundation of all equitable remedies.

SEC. 39. It should be borne in mind that the object of this analysis is to point out the features of the equitable remedial right which distinguish it from the legal; and to show what conditions are essential, in addition to the legal validity of an agreement, in order that the equitable remedy may be obtained. 1. In the first place, the elements of certainty, unambiguity, and a valuable consideration, are substantially the same, taking into account the difference in the kinds of relief conferred, as the ordinary prerequisites to the recovery of a judgment at law for damages. In an action at law the agreement must be so certain and free from ambiguity, that the court can construe it and determine the plaintiff's right to recover. In the suit for a specific performance no different *kind* of certainty is required; the

(1) See *Willard v. Tayloe*, 8 Wall. 557, 565-567; *Stone v. Pratt*, 25 Ill. 25, 34; *Quinn v. Roath*, 37 Conn. 16, 24; *Bruck v. Tucker*, 42 Cal. 346, 353; *Snell v. Mitchell*, 65 Me. 48, 50; *Port Clinton R. R. v. Cleveland & T. R. R.*, 13 Ohio St. 544, 549; *Smoot v. Rea*, 19 Md. 398; *St. Paul Division v. Brown*, 9 Minn. 157.

(2) *Seymour v. DeLancey*, 6 John. Ch. 222, 224, 225; *Blackwilder v. Loveless*, 21 Ala. 371, 374; *Snell v. Mitchell*, 65 Me. 48, 50; *McComas v. Easley*, 21 Gratt. 23, 29, 30; *Bruck v. Tucker*, 42 Cal. 346, 353; *Bogan v. Daughdrill*, 51 Ala. 312, 314; *Aston v. Robinson*, 49 Miss. 348; *Quinn v. Roath*, 37 Conn. 16, 24; *Stone v. Pratt*, 25 Ill. 25, 34; *Fish v. Leser*, 69 Ill. 394, 395; *Marble Co. v. Ripley*, 10 Wall. 339, 357; *Willard v. Tayloe*, 8 Wall. 557, 566, 567; *Rogers v. Saunders*, 16 Me. 92, 97.

only possible difference is one of degree, which results from the particular and special nature of the relief to be granted. As the remedy consists in carrying into execution the very terms of the contract, all those terms must be sufficiently precise and unambiguous for the court to enforce the whole contract and secure *all* the rights of both the parties. There is, therefore, no extraordinary quality in the certainty demanded by a court of equity; in both jurisdictions the language in which the parties have expressed their agreement, must enable the court to ascertain their rights, and to award the appropriate relief. The requisite of a valuable consideration is the same in both judicial proceedings, with the single difference that equity does not attribute the common-law efficacy to a seal, nor allow it to take the place of direct proof. 2. The second element—of mutuality—is partly an expression of the common-law rule that a contract must be the assent of both the parties and be binding upon both, and is partly referable to the equitable principle which will be next mentioned. A *purely* unilateral promise, without any acceptance or assent by the other party, cannot be enforced at law; and if the agreement is still entirely executory no action upon it may, in general, be maintained by either party. Whatever force and effect the requirement of mutuality possesses beyond this legal doctrine, results from the principle just alluded to, and which is stated at large in the following paragraph: It is plain that the conditions for administering the equitable relief, as far as examined, have no special or peculiar character, but are substantially identical with those which permit the recovery of a legal judgment, somewhat modified in degree to correspond with the different kind of remedy.

SEC. 40. 3. The third, and by far the most important, element of fairness and equality in the terms of the contract, and in its operation upon the defendant, in whatever form and with whatever variety of detail it be expressed, is simply an application of the grand and far-reaching principle that he who seeks equity must do equity. From this fruitful doctrine is derived a large part of the remedial system administered by courts of equity. When an agreement is tainted with fraud, mistake, duress, or any other analogous defect which constitutes a defense in bar at law, or furnishes sufficient grounds for setting it aside in equity, there is in truth no binding contract, and in this respect both jurisdictions are governed by the same regulations. The great and most beneficial principle, to which I have referred, extends far beyond these features which affect the validity and very existence of agreements; it applies to contracts which are

valid, and which confessedly create legal obligations; it is developed in its practical operation, so as to resist and counteract every possible circumstance and incident of unfairness, inequality, and inequity. The doctrine that he who comes into the court seeking equity—that is, seeking to obtain an equitable remedy—must himself do equity, means not only that the complaining party must stand in conscientious relations towards his adversary, and that the transaction—be it a contract or not—from which his claim arises, must be fair and just in its terms, but also that the relief itself must not be oppressive or hard upon the defendant, and must be so modified and shaped as to recognize, protect, and enforce the latter's rights arising from the same subject-matter, as well as those inhering in the plaintiff. It is by virtue of this principle that the specific performance of a contract will be refused when the plaintiff has obtained the agreement by sharp and unscrupulous practices, by overreaching, by concealment of important facts, by trickery, by taking undue advantage of his position, or by any other means which are unconscientious; and when the contract itself is unfair, one-sided, unconscionable, or affected by any other such inequitable feature, and where the specific enforcement would be oppressive or harsh upon the defendant, or would prevent the enjoyment of his own rights, or would in any other manner work injustice. The requisite of mutuality is obviously involved in certain phases of this principle. Unless the contract and the remedy were mutual, they would be one-sided, unfair, burdensome upon the defendant without affording him an opportunity for any corresponding benefit.

SEC. 41. I shall illustrate the foregoing proposition, by showing how the general language of judicial opinions should be limited by the facts, and how the decisions actually made have been applications, under one form or another, of this equitable principle. By a contract, made in 1854, a lessee acquired the right to purchase the premises, and to receive a conveyance thereof, at the expiration of his ten years' term, for a specified price. The price was adequate, the agreement was, in every way, fair, and the purchaser acted with perfect uprightness in the whole transaction. At the time for execution, the legal-tender notes had been issued, and were much depreciated in comparison with coin. The purchaser offered the price in these notes, but the vendor refused to complete. On a bill for a specific performance, the relief was refused, unless the plaintiff would pay the purchase-money in gold coin. In this case, to compel the defendant to convey his property, and to accept a depreciated currency, which was not contemplated when the bargain was made,

would have been harsh and unjust toward him, and the plaintiff was, therefore, required to do equity by accepting a modified form of relief, which recognized and protected the rights of the defendant.(1) In another case, the conduct of the complainant, in setting up unfounded claims, from time to time, under the contract, and especially his unlawful, unwarranted, and clandestine interference with the defendant, and attempt to deprive it of all its rights and interests under the contract, were held to leave him no standing as a complainant asking for its specific performance. Here, the plaintiff's own acts, done under pretense of carrying out the agreement, were so tricky, unfair, and oppressive, his whole conduct had been so inequitable, that he could not claim an equitable remedy.(2) Again, while the same contract was binding upon the defendant indefinitely, the plaintiff might, at any time, abandon it, by giving a notice. The lack of mutuality here is objectionable, because it makes the bargain one-sided; all advantage is on the plaintiff's part, and he could not do equity while he thus, practically, deprived the defendant of any remedy against himself.(3)

SEC. 42. By a contract between two partners, the defendant agreed to convey to the plaintiff certain land, used in carrying on the business, when he had been paid the price out of the firm profits over and above his own share. A suit for a specific performance was dismissed, because the plaintiff failed to exhibit any account of the business which had been carried on by himself alone, or to show, in any manner, that the defendant had received the purchase-money. Although the court repeated the usual formula concerning the "discretionary" nature of the relief, the decision did not involve any such question, nor turn upon the equitable principle now under discussion; it was simply a case of non-performance, by the plaintiff, of the term on his part, which was a condition precedent to any recovery at law or in equity.(4) The owner of city lots in Chicago, a weak-minded man, ignorant of business and of their value, was induced, during the excitement just after the great fire, to agree to sell them for \$21,000. They were worth, at the time, at least \$30,000, and were rapidly increasing in value. Persons of large property had just made arrangements to build extensively upon the adjoining lots, which would have largely added to the value of the property. All these facts were well known to business men generally, but were not known to the vendor, and were not told to him before the agreement

(1) *Willard v. Tayloe*, 8 Wall. 557, 565.

(3) *Ib.* 359.

(2) *Marble Co. v. Ripley*, 10 Wall. 339, 357.

(4) *Fish v. Lightner*, 44 Mo. 268, 272.

was signed. The person who procured him to sell, and was made his agent to effect the sale, appeared to be also acting on behalf of the purchasers, and this fact was concealed. A specific performance, prayed for by the purchaser, was refused. Even granting that the fraud, false-representation and concealment, were not sufficient to constitute a defense at law, or grounds for a cancellation in equity, still the agreement was procured by trickery, overreaching, and taking advantage of the vendor's ignorance; the parties did not stand upon an equal footing in respect to knowledge; and it was unfair, one-sided, and unjust in its terms. To compel a conveyance, under these circumstances, would have been inequitable, and even oppressive. The plaintiff, instead of "doing equity," was asking the court to enforce a bargain which wanted little of being literally fraudulent.<sup>(1)</sup> The owner of land agreed to sell it for \$4,000, and a part of the purchaser's interest was assigned to the plaintiff. The original contract of sale contained further stipulations, on the part of the vendor, and a clause, by virtue of which all his interest, under the agreement, became liable, in case of his default, to a forfeiture. The vendor made default in respect to some of these provisions, whereupon all his interest was forfeited, in some judicial proceeding, and sold to the plaintiff for a small sum, none of which was received by the vendor. The plaintiff, being assignee of a part of the vendee's interest, and having thus become clothed with the vendor's interest, brought a suit for a specific performance, which was refused, on the ground that defendant had received no compensation whatever for

(1) *Fish v. Lesser*, 69 Ill. 394, 395. The recent case of *Falck v. Gray*, 4 Drew. 651, before KINDERSLEY, V. C., was quite similar. The defendant, an elderly woman, being ignorant of their real worth, had agreed to sell two very valuable jars — articles of *virtu* — to the plaintiff, who knew their nature and peculiar value. Although there was no actual fraud, yet, as the parties did not make their contract upon an equal footing, a specific performance was refused. See, also, *Torrance v. Bolton*, L. R., 8 Ch. 118. In suit by vendor, when the description is misleading, the onus is on him to show that the defendant was *not* misled. Actual fraud not necessary, even, to set aside a contract for sale of land; enough that it is *unconscientious*. *Phillips v. Homfray*, L. R., 6 Ch. 770; suit by a purchaser; a specific performance refused because the plaintiff had concealed a material fact relating to the land, viz., his own acts in digging coal upon the land, which was mining land. Even though there had been no undervaluation in the price agreed to be paid, *i. e.*, the price was fair, on the assumption that all the coal was left *in situ*. *Wycombe Ry. Co. v. Downington Hospital*, L. R., 1 Ch. 268 (effect of mutual mistake in understanding the agreement); *Mortimer v. Bell*, L. R., 1 Ch. 10 (effect of "puffers" at auction sale); *Gilliatt v. Gilliatt*, L. R., 9 Eq. 60 (puffers at auction sale); *Baskcomb v. Beckwith*, L. R., 8 Eq. 100 (mistake, misleading deception).

his land, and the decree, under the circumstances, would be harsh and oppressive. From the peculiar terms of the contract, and the subsequent proceedings, the plaintiff had obtained an unconscionable advantage, and was seeking to obtain title to a valuable piece of land, for which he had paid but little, and for which the owner had been paid absolutely nothing.(1) The defendant, being in possession of a tract of land, worth several hundred dollars, under a claim of title, the plaintiff instituted proceedings against him, under the statute concerning forcible entry and detainer, in which a question of title is not determined, which resulted in a judgment and warrant of dispossession. While the plaintiff held the process for removal, the defendant, who had growing crops upon the land, entered into an agreement whereby, in consideration of \$30, he promised to give up possession and to execute a deed of conveyance at the end of a year. This contract the court refused to specifically enforce, because, although there was no active fraud or mistake, the parties did not deal on equal terms; the plaintiff, with his judgment and process of dispossession, occupied a position of unfair advantage, whereby he secured the contract for a very inadequate consideration, while the defendant was not in a situation to insist upon fair and equal terms.(2) Where a specific performance has been refused, on the ground of a mere inadequacy of price, the real objection was to the unfairness and inequality of the agreement, and the injustice of compelling the owner to convey his land for a sum much less than its value.(3)

SEC. 43. These cases, which are simply taken as examples, show that the so-called "discretionary power" of the court to grant or refuse a specific performance, so far as its exercise depends upon the good conduct and conscientiousness of the plaintiff, and upon the elements of fairness, equality, justice, mutuality, and the like, in the agreement, and upon the absence of harshness in the relief towards the defendant, is an application to this particular kind of remedy of the broad and fundamental principle: "He who seeks equity must do equity." The same principle is implicitly contained in the doctrine that equity, with equal care, recognizes, protects, and enforces the rights of both plaintiff and defendant in the same decree, and

(1) *Stone v. Pratt*, 25 Ill, 25, 34. The opinion, quoted under § 35, is an admirable statement of the true equity doctrine. See, also, *Bruck v. Tucker*, 42 Cal. 346, 353.

(2) *Blackwilder v. Loveless*, 21 Ala, 371.

(3) *Seymour v. De Lancey*, 6 John, Ch. 222, 224.



that an equitable remedial right does not, in general, arise from any special facts of one transaction separated from others, but depends upon, and is modified by, all the circumstances and incidents which, taken together, constitute the subject-matter of a suit, and determine the relations of its parties.

SEC. 44. 4. Another special rule, which applies to a certain class of cases, has, perhaps, the appearance of being purely discretionary; but it will be found, upon closer examination, to depend upon the same general principle of equity. I refer to the settled doctrine that in suits for a specific performance, brought by a vendor of land, the purchaser will not be forced to complete the contract and accept a conveyance, when the title is so doubtful that he might be exposed to litigation from an adverse claimant, or to a loss of his purchase, even though the court does not pass upon the question of title and definitively pronounce it to be bad. The mere fact that the title is, fairly and reasonably considered, a doubtful one, prevents the court from forcing its acceptance by an unwilling vendee.<sup>(1)</sup> The real nature of this special rule is plain, upon an examination of the reasons upon which it rests. If it clearly appears that the vendor has no such title at all as he has undertaken to convey, a specific performance is, of course, refused, since it would be a monstrous wrong to force the purchaser to pay the price and accept a conveyance when he does not thereby obtain the estate for which he contracted. Carrying this notion one step further; if a reasonable doubt is thrown by the evidence upon the vendor's title, and it is thus rendered reasonably probable that the purchaser would lose all benefit of his bargain, or become involved in unlooked-for expenses, the contract itself would plainly be one-sided and unconscientious, and its enforcement would be unjust and oppressive. It is obvious, therefore, that the rule, under consideration, does not require the exercise of any judicial discretion; the only *apparent* discretionary elements consists in the decision for each case whether there is a reasonable doubt; but this decision is no more discretionary than that of many other matters of fact depending upon the weighing of probabilities. The court decides, with all the certainty which the nature of the question and of the evidence will permit, that a reasonable doubt exists as to the vendor's title, and having reached this *condition of fact*, it applies, not as a matter of discretion, but as a matter of right belonging to the defendant, the

(1) This rule is simply stated here without discussion. It will be found treated at length, and the cases involving it cited, in a subsequent section, viz., chap. 2, Sect. 11.

principle, that he who seeks equity must do equity, and refuses a remedy which would be one-sided, unfair, and even oppressive.

SEC. 45. 5. Finally, the requisite that the contract must be one capable of specific enforcement by a decree of the court, has no connection whatever with any discretion to be exercised in granting or withholding such decree. The want of power to specifically enforce may consist in a physical or legal inability of the defendant to perform what is ordered, resulting from his having parted with all interest in, or control over, the subject-matter, or from some other efficient cause; or it may inhere in the very terms of the contract itself, which are of such an intricate, various, personal, or special nature, that the court cannot, by any of its administrative means and methods, superintend and compel the execution. In either case the defect is absolute, and resides in the necessary imperfection of all judicial machinery. The difficulty does not lie in the pronouncing a decree which shall sufficiently describe and command all the required acts, but in carrying that decree into operation. No tribunal, though possessing the powers and methods of chancery, can compel a defendant to convey a good title to the plaintiff, when he has already conveyed the land to another and *bona fide* purchaser; or can compel a prima donna to perform at the opera with all her skill and ability; or can compel a contractor to construct an extensive line of railway according to the specifications of his agreement. The requirement, therefore, that the contract must be one capable of specific enforcement does not involve any element of discretion, does not result from any discretionary nature of the jurisdiction, and does not render the remedy itself discretionary. Courts of law cannot compel the performance of any contract except by a pecuniary judgment; courts of equity are able to specifically execute many classes of agreements; but there are species of contracts the specific performance of which cannot be enforced by any tribunals.(1)

SEC. 46. The conclusion reached by the foregoing discussion is, I think, equally obvious and certain. The language which describes the remedy of specific performance as depending upon an exercise of discretion—even of judicial discretion—unless taken with certain limitations and interpreted in a particular manner, is misleading; it is a misconception which represents the granting of this relief as in any sense a matter of grace, or depending upon the favor of the court.

(1) For a full discussion of the doctrine that specific performance must be practicable, see chap. 2, Sects. 17, 18.

Courts of equity do not sit, any more than courts of law, to distribute favors or acts of grace to their suitors; their judicial function consists in the protection of rights and the enforcement of duties by means of the remedies which they administer. The right to this particular remedy, being equitable, involves a variety of circumstances, incidents, and relations which may promote, modify, impede, or prevent its use, and one of the most important of these circumstances consists in the fact that a denial of the relief does not, in general, leave a party without his legal remedy. Where all the proper conditions are present, the remedial right is as perfect, certain, and absolute as the nature of the remedy itself will permit. Many of the judicial opinions state the doctrine in this manner.(1) In determining a particular case, after it is ascertained that the contract is legally valid, the question of granting a specific performance often turns upon collateral incidents, more or less numerous, which affect the equitable jurisdiction. The decision of these matters—for example, whether the conduct of the plaintiff has been conscientious; whether the agreement itself is fair, equal, reasonable; whether its enforcement specifically will be just toward the defendant, and the like—as it requires the examination of numerous special circumstances, and is controlled by no definite rule, may seem, upon a superficial observation, to be merely an exercise of judicial discretion. All these collateral features of the case are, however, questions of fact to be decided upon the evidence; and when they have been thus established, the principles of equity come into operation, and pronounce with certainty and absoluteness whether the remedy shall be granted or withheld.

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### SECTION III.

#### *Will not be granted when the legal remedy is sufficient.*

SECTION 47. The description of the general nature of specific performance, and of the equitable right to it, will be completed by a brief discussion of the principle that it cannot be granted when the legal remedy of damages is sufficient—that is, practicable and adequate; which is the converse of the doctrine developed in Section I

(1) See *McComas v. Easley*, 21 Gratt. 23, 30; *Hale v. Wilkinson*, 21 Gratt. 75, 80; *Bogan v. Daughdrill*, 51 Ala. 312, 314; *Snell v. Mitchell*, 65 Me. 48, 50; *Rogers v. Saunders*, 16 Me. 92, 97; *Port Clinton R. R. v. Cleveland & Toledo R. R.*, 13 Ohio St. 544, 549.

of this chapter. It is the fundamental principle regulating the exercise of this equitable jurisdiction, that whenever the legal remedy of damages is sufficient, equity will not interfere, and the specific performance will be refused; and this is always the case when the contract is satisfied by a payment of money. This rule has a wide application to a great variety of agreements.(1) For this reason contracts concerning goods, wares, and merchandise, and other ordinary chattels, or public and other stocks or securities, which have a market value and sale, are not specifically executed.(2)

SEC. 48. Many of the ordinary classes of contracts, for which the legal remedy is sufficient, have been mentioned in Section I, and need not be repeated here. In addition to these, the following cases have been decided. Where the rights of the party, plaintiff, under a contract, will be fully satisfied by an account of profits, and a payment of the sum found due thereby, and there is no obstacle to a recovery of such amount at law, a suit for a specific performance cannot be maintained.(3) Since the breach can always be fully compensated by

(1) For instance, of contracts with railway companies, see *Loud James Stuart v. London, & N. W. R'y Co.*, 1 DeG. M. & G. 721; *Webb v. Direct London, etc., R'y Co.*, 1 DeG. M. & G. 521; but see remarks on these cases in *Hawkes v. Eastern Counties R'y Co.*, 1 DeG. M. & G. 737; 5 H. L. Cas. 331, per *Ld. St. LEONARDS*; *South Wales R'y Co. v. Wythes*, 1 K. & J. 186; 5 DeG. M. & G. 880; *Meynell v. Surtees*, 3 Sm. & Gif. 101; *Morgan v. Milman*, 3 DeG. M. & G. 35; *Garrett v. Banstead, etc., R'y Co.*, 4 DeG. J. & S. 462, 465, 467. Agreement to run a grain elevator, etc., *Richmond v. Dubuque, etc., R. R.*, 33 Iowa, 423. See, also, *Hammond v. Messenger*, 9 Sim. 327; *Rose v. Clark*, 1 Y. & C. 534; *Dhegetoft v. London Ass. Co.*, Mosely, 83; 1 Atk. 547; *Carter v. U. S. Ins. Co.*, 1 John. Ch. 463; *Pitkin v. Pitkin*, 7 Conn. 315; *Bailey v. Strong*, 8 Conn. 278; *Redmund v. Dickerson*, 1 Stockt. 507; *Mechanics' B'k v. DeBolt*, 1 Ohio St. 591; *Bonebright v. Pease*, 3 Mich. 318; *Thompson v. Manley*, 16 Geo. 440; *Deggett v. Hart*, 5 Flor. 215; *Rees v. Parish*, 1 McCord Ch. 59; *Bell v. Bemen*, 3 Murph. 273; *Adair v. Winchester*, 7 Gill. & John. 114; *Smiley v. Bell, Mart. & Yerg.* 378; *Mosely v. Boush*, 4 Rand. 392; *Powell v. Central Plank-Road Co.*, 24 Ala. 441; *Strasburgh R. R. v. Echternacht*, 9 Harris, 220.

(2) See *Cud v. Rutter*, 1 P. Wms. 570; 2 Eq. Cas. Abr. 18, pl. 8; *Adderley v. Dixon*, 1 S. & S. 610; *Wright v. Bell*, 5 Price, 329; *Cappur v. Harris*, Bunb. 135; *Ferguson v. Paschall*, 11 Mo. 267; *Scott v. Bellgeny*, 4 Miss. 119; *Caldwell v. Myers*, Hardin, 551; *Madison v. Chinn*, 3 J. J. Marsh. 230; *Dalzell v. Crawford*, 2 Pa. L. J. 17, 19; *Ins. Co. of A. A. v. Union Canal Co.*, 2 Pa. L. J. 65, 67; *Savary v. Spence*, 13 Ala. 561; *Bubier v. Bubier*, 24 Me. 42; *Justices v. Croft*, 18 Geo. 473; *Roundtree v. McLane*, 1 Hempst. 245; *Waters v. Howard*, 1 Md. Ch. 12, 118; *Hoy v. Hansborough*, 1 Freem. Ch. 533, 543; *Cowles v. Whitman*, 10 Conn. 121, 124; *Brown v. Gilliland*, 3 Dessau. 539, 541; *Gram v. Stebbins*, 6 Paige, 124; *Austin v. Gillespie*, 1 Jones Eq. 261; *Ashe v. Johnson*, 2 Jones Eq. 149; *Lloyd v. Wheatley*, 2 Jones Eq. 267; *Sullivan v. Tuck*, 1 Md. Ch. 59.

(3) *Ord v. Johnston*, 1 Jur. (N. S.) 1063; *Sturge v. Midland Ry. Co.*, W. R. (1857-8) 233. And see *McKewan v. Sanderson*, L. R. 20 Eq. 65. Suit to enforce

damages, a contract to lend, either money or chattels, will not be specifically enforced ;(1) nor a contract to borrow ;(2) nor a contract to pay money.(3) A specific performance of contracts for hiring and service is also refused, because the legal remedy is sufficient, as well as because the equitable relief is impracticable ;(4) and the same is true of the contract of agency.(5)

SEC. 49. The specific performance of an agreement for a tenancy from year to year, which stipulated that the tenant was to abide, in all respects, by the terms entered into by a previous tenant, and was to pay for a further agreement to be drawn up, was refused on the ground that the legal remedy was adequate. It was contended that equity should interpose, in order to settle the proper terms of the final contract, but it was held that these might be fully shown at law.(6) Contracts for the sale of ships, or shares in them, stand upon a peculiar footing, the result of the statutory policy for encouraging and protecting domestic commerce. Under the registry acts, there can be no contract for the transfer of a British ship, or of shares in it, valid in equity, which is not also valid in law ; in other words, there is no such thing as an equitable sale or title distinct from a legal sale and title. As a contract will create a legal title, or amount to a transfer in law, it follows that the legal remedy must always be sufficient, and there can be no place for the interference of equity to compel a specific performance, and turn an equitable interest into a legal title by the execution of a conveyance.(7) This doctrine applies both to sales and

a guaranty for payment of money. *Held*, void, as being in fraud of the bankrupt act. *Also held*, in no sense a case for specific performance ; it is simply a suit against the guarantor to recover the amount due, and for an accounting to ascertain how much is due.

(1) *Flight v. Bolland*, 4 Russ. 298, 301 ; *Brough v. Oddy*, 1 R. & My. 55 ; *Sichel v. Mosenthal*, 30 Beav. 371 ; *Thorpe v. Hosford*, 20 W. R. 922. Will not specifically enforce a charter party. *DeMattos v. Gibson*, 4 DeG. & J. 276 ; *Claringbould v. Curtis*, 21 L. J. Ch. 541 ; *Norton v. Serle*, Finch. 149.

(2) *Rogers v. Challis*, 27 Beav. 175.

(3) *Crampton v. Varna, Ry. Co.*, L. R. 7 Ch. 562 ; 20 W. R. 713 (L. C.) ; *Clark v. Lord Rivers*, L. R. 5 Eq. 91 (curious case) ; but it seems an agreement to execute a mortgage, in consideration of money due, will be specifically enforced in equity. *Ashton v. Corrigan*, L. R. 13 Eq. 76.

(4) *Johnson v. Shrewsbury, etc., Ry. Co.*, 3 DeG. M. & G. 914 ; *Pickering v. Bishop of Ely*, 2 Y. & C. C. 249 ; *Stocker v. Brocklebank*, 3 Mac. & G. 250 ; *Horne v. London & N. W. Ry. Co.*, 10 W. R. 170 ; *Brett v. East India & London Shipping Co.*, 12 W. R. 596 ; *Mair v. Himalaya Tea Co.*, L. R. 1 Eq. 411.

(5) *Chinnock v. Sainsbury*, 30 L. J. (N. S.) Ch. 409.

(6) *Clayton v. Illingworth*, 10 Ha. 451.

(7) See 6 Geo. IV, ch. 110, § 31 ; 8 & 9 Vict. ch. 89, § 34, which provides that when property in a vessel, or a part thereof, shall be sold, "the same shall be

to contracts, the statutes preventing any equitable right arising from notice or other incidents.(1) A contract, however, which relates exclusively to the *proceeds* arising from the sale of a vessel, and not to the ship itself, is said not to be within the acts, and it may, therefore, under the proper conditions, be specifically enforced.(2) Although it has been judicially stated that fraud might be an occasion for the interference of equity, in respect of such contracts, no case has *decided* the question, and much less determined what particular fraud would create an equitable right.(3) The United States statutes concerning shipping are framed in accordance with the same policy, and contain similar provisions.(4) An agreement to sell a foreign ship, not affected by the navigation acts, may be specifically enforced.(5)

SEC. 50. Where the parties to any agreement, whatever may be the subject-matter or the terms, have added a provision for the payment, in case of a breach, of a certain sum which is truly liquidated damages and not a penalty—in other words, where the contract stipulates for one of two things in the alternative, the performance of certain acts, or the payment of a certain amount of money in lieu thereof—equity will not interfere to decree a specific performance of the first alternative, but will leave the injured party to his legal remedy of recovering the money specified in the second. The reason of this rule is, that

transferred by bill of sale or other instrument in writing, containing a recital of the certificate of registry of such ship or vessel, or the principal contents thereof, *otherwise such transfer shall not be valid or effectual for any purpose whatever, either in law or in equity.*" As an agreement without this recital is absolutely void, there is no such thing as an agreement to transfer a ship which does not actually transfer it, so that there can be no occasion for any further specific execution. 17 & 18 Vict. ch. 104, § 43. omits the above clause making the instrument void at law and in equity, etc., but this change in the statutory language has not made any change in the doctrine laid down by the courts. See *Brewster v. Clarke*, 2 Mer. 75; *Thompson v. Leake*, 1 Madd. 39; *Newnham v. Graves*, 1 Madd. 399, n.; *Battersby v. Smyth*, 3 Madd. 110; *Hughes v. Morris*, 2 DeG. M. & G. 349, 357; *Coombes v. Mansfield*, 24 L. J. Ch. 513; 3 Drew. 193; *Liverpool Borough Bk. v. Turner*, 2 DeG. F. & J. 502; 1 J. & H. 159; *McLarty v. Middleton*, 9 W. R. 861.

(1) *McCalmont v. Rankin*, 2 DeG. M. & G. 403, which contains an exhaustive discussion of the principle and the decisions by Ld. St. LEONARDS.

(2) *Armstrong v. Armstrong*, 21 Beav. 78; *McCalmont v. Rankin*, 2 DeG. M. & G. 424, per Ld. St. LEONARDS; *Coombs v. Mansfield*, 3 Drew. 193; *Clarke v. Batters*, 1 K. & J. 242.

(3) *Armstrong v. Armstrong*, 21 Beav. 71, 87; in *McCalmont v. Rankin*, 2 DeG. M. & G. 416, 421, Ld. St. LEONARDS said: "I am perfectly clear that, so far as the authorities have gone, there have been cases very much like fraud, and yet no relief has been given." See *Holderness v. Lamport*, 29 Beav. 129.

(4) U. S. R. S. § 4170.

(5) *Hart v. Herwig*, L. R. 8 Ch. 860.

the parties have formally agreed upon the compensation—have assessed the damages—and have thereby declared that an appeal to equity is unnecessary, since they have made the legal relief adequate.(1) If the provision for a pecuniary payment is a penalty, however, it may be disregarded, and the substantial part of the agreement specifically enforced, provided it is one to which the equitable remedy can be applied.(2) The mere fact that a contract contains a penalty is not, of itself, a ground for decreeing a specific performance; the terms must be such that relief would have been given without the penalty, and then the presence of it would not interfere with the equitable jurisdiction. It is not within the province of the present work to distinguish between penalties and liquidated damages. I have simply collected in the foot-note a number of cases

(1) *Howard v. Hopkins*, 2 Atk. 371; *French v. Macale*, 2 Dr. & War. 269; *Roper v. Bartholomew*, 12 Pri. 797; *Skinner v. Dayton*, 2 John. Ch. 526; *City Bank of Baltimore v. Smith*, 3 Gill & John. 265; *Jones v. Green*, 3 Y. & J. 208; *Coles v. Sims*, 5 DeG. M. & G. 1; *Jaquith v. Hudson*, 5 Mich. 123; *Cotheal v. Talmadge*, 9 N. Y. 551; *Bagley v. Peddie*, 16 N. Y. 469; *Chamberlain v. Bagley*, 11 N. H. 234; *Williams v. Dakin*, 22 Wend. 201; *Rolfe v. Peterson*, 2 Bro. P. C. 436; *Woodward v. Gyles*, 2 Vern. 119; *Gerrard v. O'Reilly*, 3 Dr. & War. 414; *Magrane v. Archbold*, 1 Dow, 107; *Ranger v. Great Western R'y Co.*, 5 H. L. C. 73; *Hahn v. Concordia Society*, 42 Md. 460.

(2) *Chilliner v. Chilliner*, 2 Ves. Sen. 528; *Hobson v. Trevor*, 2 P. Wms. 191; *Kennedy v. Lee*, 3 Meriv. 441, 450; *Howard v. Hopkins*, 2 Atk. 371; *Prebble v. Boghurst*, 1 Sw. 309; *Jewdine v. Agate*, 3 Sim. 141; *Logan v. Wienholt*, 1 Cl. & Fin. 611; 7 Bli. (N. S.) 1, 49, 50; *Butler v. Powis*, 2 Coll. C. C. 156; *Roper v. Bartholomew*, 12 Pri. 797; *Sloman v. Walter*, 1 Bro. C. C. 418; *Jones v. Heavens*, L. R. 4 Ch. D. 636; *In re Dagenham Dock Co. Ex parte Hulse*, L. R. 8 Ch. 1022 (provision in a certain contract for sale of land held to be a penalty). A bond with a penalty to convey land will be specifically enforced against the obligor; he cannot elect to convey or to pay the penalty; it is immaterial that the purchaser is not formally bound, or has not performed, if he offers to perform; performance on his part can be secured in the decree. *Ewins v. Gordon*, 49 N. H. 444. Where a person has bound himself, by his covenant, to do or to omit a specified thing, and has fixed a certain sum of money which he will pay upon a breach of the covenant, he is not thereby absolved from the performance of the thing agreed, and equity will specifically enforce the contract, if it is otherwise a proper one to be so enforced. *Gillis v. Hall*, 7 Phila. 422; 2 Brews. 342; *Dooley v. Watson*, 1 Gray, 414, per SHAW, C. J.: "Courts of equity have long since overruled the doctrine that a bond for the payment of money, conditioned to be void on the conveyance of land, is to be treated as a mere agreement to pay money. When the penalty appears to be intended merely as a security for the performance of the agreement, the principal object of the parties will be carried out." See, also, *Hooker v. Pyncheon*, 8 Gray, 550; *Fisher v. Shaw*, 42 Me. 32; *Hull v. Sturdivant*, 46 Me. 34; *Dailey v. Lichfield*, 10 Mich. 29. In *Whitney v. Stone*, 23 Cal. 275, it was held that an award otherwise proper would be enforced, although the agreement to submit contained a penalty.

in which contracts, with penalties, have been specifically enforced. Having thus described the general nature of the remedy, I shall proceed to discuss, in a more particular and exhaustive manner, the features and incidents which must belong to the contract in order that the equitable remedial right may exist.



## CHAPTER II.

THE NATURE, ELEMENTS, FEATURES, AND INCIDENTS WHICH MUST BELONG TO CONTRACTS IN ORDER THAT THEY MAY BE SPECIFICALLY ENFORCED.

SECTION 51. I purpose, in the present chapter, to examine, in an exhaustive manner, those elements inhering in the very contract itself, and those incidents connected with its formation, all of which, taken together, determine whether the remedy of specific performance can be granted. This discussion does not embrace the acts or omissions of the parties subsequent to entering into the agreement which affect the right to relief, such as the performance or non-performance of conditions precedent, delay when time is or is not of the essence, and the like, nor the proceedings connected with the suit and the settling the decree; but the inquiry is confined to the essential features of the contract, and to the acts and omissions of the parties during the preliminary negotiations, or during the process of formulating their mutual assent, which may impart a special character to the resulting compact. Upon these essential features and this preliminary conduct depends the right to the equitable remedy. The examination of these elements and incidents will be facilitated by arranging them, according to a natural division, into four (4) distinct classes, namely:

*First.* Those which pertain to the external form of the agreement, and the manner of expressing its various terms, and which, in analogy to the common-law requisites, relate to the very existence of a binding contract.

*Second.* Those which do not involve the validity of the contract, but directly affect the equitable remedy on the principle that he who seeks equity must do equity.

*Third.* Incidents connected with the preliminary conduct of the parties, which involve the validity of the contract in equity. and, therefore, affect the equitable remedy.

*Fourth.* Those features and incidents which relate to the actual enforcement of the decree, and require that a specific performance should be practicable.

## FIRST.

*Those features which pertain to the external form of the agreement, and the manner of expressing its various terms, and which, in analogy to the common-law requisites, relate to the very existence of a binding contract.*

SECTION 52. As the very basis of the remedy of specific performance, there must, in general, be a valid and binding contract. Even those special instances where equity will give relief, although no action at law can be maintained, are not, in substance, departures from the principle. In the case of verbal contracts, remediless at law under the statute of frauds, but which equity will enforce when sufficiently part performed, there must still be a perfect and certain agreement; a complete assent of the parties, which would be binding, were it not for the statute. In the cases where an action at law would fail because the plaintiff has not fully performed all of the terms on his part, but where equity, regarding these terms as not of the essence, will grant its remedy, there must originally have been a contract legally valid. And even in those very rare and exceptional cases, where no legal action can be maintained because the stipulations are provisional, and contemplate some further undertakings in order to completely express and carry out the intentions of the parties, equity interferes to execute the agreement only when its terms are so explicit, clear, and certain that a refusal to perform them would be unconscientious. The particular matters, therefore, embraced under the foregoing division, belong rather to the general doctrine of contracts than to the special subject of specific performance; they directly answer the question: What is a valid and binding contract which may be enforced by any remedy, legal or equitable? And only indirectly the inquiry: What are the contracts to which the equitable remedy is confined? Some of the matters relate so closely to the validity of all contracts, that I shall treat of them in a very brief and cursory manner, referring the reader to the treatises upon contracts at large; others have so practical and intimate a connection with the remedy of specific performance, that their discussion will be thorough and exhaustive. The features of the contract included within the first class, as above mentioned, are: The capacity of the parties to contract; the consideration; the conclusion of the contract; its completeness; its certainty; its mutuality.

## SECTION I.

*The parties must have the capacity to contract.*

SECTION 53. Both the parties must have the legal capacity to contract. The defendant may always set up his own want of such capacity as a defense; and by virtue of the doctrine that the remedial right must be mutual—which will be discussed in a subsequent section—he may, also, rely upon the want of the capacity in the plaintiff. Capacity is not a right, for a right must necessarily be held by one person relatively to another person or persons, and always implies corresponding duties resting upon that person or collection of persons. Capacity is not thus, in its essential nature, relative, and does not involve the existence of corresponding duties. Legal capacity is the power residing in a person of acquiring, holding, and transferring legal rights, or of becoming subjected to legal duties. Capacity to contract is, therefore, the legal power residing in a person of acquiring rights, or of becoming subjected to duties, by means of a contract to which he is one of the parties. The existence of such capacity is the general rule, and the cases where incapacity is complete and absolute are plainly few and infrequent. The common-law disabilities of married women, modified in the first place by courts of equity, have been, to a much greater extent, removed by modern legislation in most of the American states. The incapacity of infants is partial only, while that of lunatics and persons of unsound mind depends upon the mental condition, and disappears entirely during lucid intervals. The incapacity to contract should be carefully distinguished from what is often, but most improperly, called the incapacity to execute a contract. In the condition indicated by the latter expression, there is no incapacity, but only an inability or impossibility, arising from the special circumstances. When a person has agreed to sell a certain farm which he does not own, or which he has conveyed to another person in good faith, he cannot perform his contract, not because of any incapacity residing in him to convey land, but because of his inability to convey that particular land resulting from his want of title. The capacity or incapacity of a party to contract must be referred to the act of making the agreement, and be judged of at that time; the inability of a party to perform must be referred to the time of execution.

SEC. 54. The ordinary instances of legal incapacity to contract arising from marriage, infancy, lunacy, unsoundness of mind, and the like,

have no peculiar effect upon the equitable remedy different from that produced upon the legal action for a pecuniary judgment. Their discussion properly belongs to a treatise upon the Law of Contracts, and will be entirely omitted in the present work. I shall confine myself to the capacity of married women, conferred by recent legislation, to contract with reference to their separate estates; and to the incapacity of corporations with reference to contracts *ultra vires*.

SEC. 55. The existing statutes of the several states concerning married women, so far as they have abolished the common-law rules and disabilities, are of two distinct types. The general intent of the first class is to place the wife, with respect to her own property, in exactly the same legal position which a single woman or a married man occupies. All the real and personal property which she owned before marriage, and all that she acquires during the marriage by gift, grant, purchase, devise, etc.—and, in most of the states, all that she obtains as earnings or by her services—is her own separate property, free from all right and interest of her husband; she possesses the sole power to manage it; may sell or convey it, or any part of it, without the consent or joinder of her husband; and may make any contracts in relation to it in the same manner, and to the same extent, and with like effect, as though she were single; or, as it is expressed in several states, “as a married man may in relation to his real and personal property.”(1) In some of the statutes, however, which fairly belong to this class, since they permit the wife to “sell and convey” her property without the consent or joinder of her husband, the provision empowering her to make *all contracts* in relation to her property, is omitted.(2) In the second class, the property of a married woman is, also, declared to be her separate property, free from any interest or control of her husband, and not liable for his debts, but the statutes contain no provision expressly empowering her to make contracts, and

(1) Laws of New York, 1860, ch. 90, §§ 1-3, 7, 8; *ib.* 1862, ch. 172, §§ 1-4. *California*—Civ. Code, §§ 162, *et seq.* *Illinois*—Gen. Stat. (Gross), v. 3, p. 229, §§ 6, 9 (passed in 1874); *ib.* v. 1, p. 439, § 2. *Iowa*—Rev. Code (1873), p. 396, § 2202; p. 398, § 2213. *Kansas*—Gen. Stat. (1868), p. 563, § 2. *Massachusetts*—R. S. (1873), p. 537, §§ 1, 3, 5; also Laws of 1874, ch. 184, § 1 (Supp. to R. S., v. 2, p. 132). *Michigan*—Comp. Laws (1871), v. 2, p. 1477, § 1. *Nebraska*—Gen. Stat. (1873), p. 465, §§ 1, 4; p. 880, § 42. *New Hampshire*—Gen. Stat. (1867), p. 337, § 1; p. 338, §§ 5, 13. (No express power is given to the wife to convey her real estate, but she has the same rights and remedies, may sue and be sued in law and equity upon any contract made by her, as though she were single; wives of aliens, etc., living apart from their husbands, may contract, convey, etc.). *Wisconsin*—R. S. (1871), p. 1195, §§ 1-3.

(2) *Maine*—R. S. (1871), p. 491, § 1. *Wisconsin*—R. S. (1871), p. 1195, §§ 1-3.

the husband must join in all contracts relating to or conveyances of her land, or give his assent thereto. In several of the states, whose legislation belongs to this class, the wife is clothed with the full power of a single woman while she is living separate from her husband, or while he is insane, or imprisoned in a state prison.(1)

SEC. 56. *Contracts ultra vires of corporations.*—Analogous to the legal capacity of natural persons to make valid agreements is the legal power of corporations—often called artificial persons—to enter into contracts which shall create rights and duties enforceable at law or in equity. Any discussion of the powers of corporations is, of course, wholly beyond the scope of this treatise; and I shall simply state the general principles which determine the validity and govern the enforcement of corporate contracts. The fundamental doctrine is now settled, both in Great Britain and in the United States, that all civil corporations, private or municipal, are capable of binding themselves by any contract, except when the statutes by which they are created or regulated expressly, or by necessary implication, prohibit such contract. Or, to state the same proposition in an affirmative manner, corporations possess all those powers which are expressly conferred upon them by the acts of incorporation, and all those additional powers (sometimes denominated incidental), which are reasonably necessary for the purpose of carrying into effect the powers expressly granted, and of thus attaining the objects of their creation, and they possess no others.(2) The same fundamental principle con-

(1) *Alabama*—Code (1867), § 2373. *Florida*—Bush's Dig., p. 580, § 4. *Kentucky*—R. S. (Stanton's), v. 2, p. 12, § 14 (if husband abandons his wife or is imprisoned more than a year, she may make contracts, etc.). *Maryland*—Code, v. 1, p. 325, § 1, p. 326 (her earnings she can sell, invest, and dispose of as a single woman). *Minnesota*—Stat. at Large (1873), v. 1, p. 702, §§ 47, 48. *New Jersey*—Nixon's Dig. (4th ed.), p. 548, § 12; p. 549, § 18 (when husband is lunatic, etc., or imprisoned, or they are living separate under a judicial decree, wife can contract or convey, but even then cannot cut off any interest which he may have). *Oregon*—Gen. Laws (1872). pp. 25, 663. *Ohio*—R. S. Supp., pp. 389–391. *Pennsylvania*—Brightley's Purdon's Dig., v. 2, p. 1005, § 13. *Rhode Island*—Gen. Stat. (1872), p. 329, §§ 1, 7; R. S., p. 314, §§ 1, 3 (wife living apart from her husband may sell, convey, etc.). *Tennessee*—Stat. (1871), §§ 2486a–2486f (when wife lives apart, or husband is insane, etc., she can dispose or convey as a *feme sole*). *Vermont*—Gen. Stat. (1862), p. 471, § 18.

(2) *Colman v. Easton Counties R'y Co.*, 10 Beav. 1, per Lord LANGDALE; *Bagshaw v. Eastern Union R'y Co.*, 7 Har. 114, per WIGRAM, V. C.; *Shrewsbury, etc., R'y Co. v. London, etc., R'y Co.*, 22 L. J. Ch. 682, per TURNER, L. J.; *South Yorkshire, etc., Co. v. Great Northern R'y Co.*, 9 Exch. 55, 84, per PARKE, B.; *East Anglian R'y Co. v. Eastern Co. R'y Co.*, 11 C. B. 775, per JERVIS, C. J.; *Eastern Co. R'y Co. v. Hawkes*, 5 H. L. Cas. 348, per Lord CRANWORTH; *Scottish*

cerning the powers of corporations is found alike in the British and in the American law; the differences between the two consist in the application of this principle. The American law is liberal in admitting implied powers, and its tendency is to regulate the acts, transactions, and contracts of corporations, within the scope of their authority, by the same rules which govern the similar acts and obligations of natural persons. As the general principle formulated above defines the nature and extent of all corporate powers, it must be invoked to determine the validity of contracts made by corporations, and its effect upon such contracts is the only question for our present consideration. In the first place, it is the settled rule that all contracts made by a corporation are *prima facie* valid, and the burden of proof lies on the party who impeaches any particular corporate agreement.(1) Contracts and other acts of a corporation, which exceed

N. E. R'y Co. v. Stewart, 3 Macq. 382, 414, per Lord WENSLEYDALE; Shrewsbury, etc., R'y Co. v. North W. R'y Co., 6 H. L. Cas. 113, 124, per Lord CRANWORTH; Taylor v. Chichester, etc., R'y Co., L. R. 2 Exch. 356, 384, per BLACKBURN, J.; Bissell v. Michigan So., etc., R. R., 22 N. Y. 262, 281; Curtis v. Leavitt, 15 N. Y. 157; Buffet v. Troy & B. R. R., 40 N. Y. 168; People v. Utica Ins. Co., 15 Johns. 358; N. Y. Fireman's Ins. Co. v. Sturges, 2 Cow. 675; N. Y. Fireman's Ins. Co. v. Ely, 2 Cow. 699; LeCouteux v. Buffalo, 33 N. Y. 333; Trustees v. Peaslee, 15 N. H. 330; Downing v. Mt. Washington Road Co., 40 N. H. 230; Fuller v. Plainfield School, 6 Conn. 532; Hood v. N. Y. & N. H. R. R., 22 Conn. 1; Shawmut Bk. v. P. & M. R. R., 31 Vt. 491; Com. v. Erie, etc., R. R., 3 Casey, 352; Penn., etc. Nav. Co. v. Dandridge, 8 G. & J. 248; Whites Bk. v. Toledo Ins., 12 Ohio St. 601; R. R. v. Seeley, 45 Mo. 220; Petersburg v. Metzker, 21 Ill. 205; Whitman Mining Co. v. Baker, 3 Nev. 386; Vandall v. S. S. F. Dock Co., 40 Cal. 83; Miner's Ditch Co. v. Zellerbach, 37 Cal. 543; Bk. of Augusta v. Earle, 13 Peters, 587; Dartmouth Coll. v. Woodward, 4 Wheat. 636.

(1) Shrewsbury, etc., R'y Co. v. North Western R'y Co., 6 H. L. Cas. 113, 124, per Lord CRANWORTH; Scottish North Eastern R'y Co. v. Stewart, 3 Macq. 382, 414; Taylor v. Chichester, etc., R'y Co., L. R. 2 Exch. 356, 384, per BLACKBURN, J., who said: "We are entitled to consider the question to be, not whether the defendants had, by virtue of the acts of incorporation, authority to make the contract, but whether they are by those statutes forbidden to make it." Chautauque County Bk. v. Risley, 19 N. Y. 369; Farmers' Loan & T. Co. v. Clowes, 3 N. Y. 470; DeGroff v. American, etc., Co., 21 N. Y. 124; Yates v. Van De Bogert, 56 N. Y. 526; Akin v. Blanchard, 32 Barb. 527; McFarlan v. Triton Ins. Co., 4 Denio, 392; Farmers' Loan & T. Co. v. Perry, 3 Sandf. Ch. 339; Safford v. Wyckoff, 4 Hill, 442; Fireman's Ins. Co. v. Sturges, 2 Cow. 664; *Ex parte* Peru Iron Co., 7 Cow. 540; Downing v. Mt. Washington, etc., Co., 40 N. H. 230. Middlesex, etc., Assn. v. Davis, 3 Met. 133; Morris & Essex R. R. v. Sussex R. R., 5 C. E. Green, 542; Allegheny City v. McClurkan, 14 Pa. St. 81; Blake v. Holley, 14 Ind. 383; Charleston, etc., Turnp. Co. v. Willey, 16 Ind. 34; Dana v. Bank of St. Paul, 4 Minn. 385; Underwood v. Newport Lyceum, 5 B. Mon. 129; Talmadge v. N. A. Coal Co., 3 Head, 337; Mitchell v. Rome R. R., 17 Geo. 574; Oxford Iron Co. v. Spradley, 46 Ala. 98.

or are beyond the powers conferred by law upon the entire body acting through any of its instrumentalities, are called, in the modern legal nomenclature, *ultra vires*. This quality inherent in the corporate act should be carefully distinguished from *illegality*, and from the mere exceeding the powers conferred upon the corporation officers or other agents acting *as agents*. Cases of illegality are governed by rules applicable alike to corporations and to individuals; while cases of mere transcending the authority held by the corporate agents, are determined by the doctrines of the law as to agency.(1) A contract is *ultra vires* where it is not within any of the powers expressly or impliedly conferred upon the corporation by its act or acts of incorporation.(2) The question as to the legal effect of corporate contracts or other acts which are *ultra vires*, may arise in three kinds of actions, namely: 1, in an action against the corporation, brought by the state or by some public officer, for the purpose of revoking its charter, or inflicting some other penalty on account of its violation of the law restraining its corporate authority; 2, in an action against the corporation, brought by an individual corporator, or sometimes by a public officer, for the express purpose of preventing it and its officers from proceeding in violation of their corporate powers; and 3, in an ordinary action, either legal or equitable, upon the contract itself,

(1) See the remarks of SELDEN, J., in *Bissell v. Michigan Southern, etc., R. R.*, 22 N. Y. 258. This distinction is very important, and a failure to observe it has led to no little confusion in some of the decisions.

(2) *Earl of Shrewsbury v. North Staffordshire R'y Co.*, L. R., 1 Eq. 593; *Taylor v. Chichester, etc., R'y Co.*, L. R. 2 Exch. 356; *Bissell v. Southern Mich., etc., R. R.*, 22 N. Y. 258; *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543, 578, per SAWYER, C. J.; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 68, per ALLEN, J., who said: "When acts of corporations are spoken of as *ultra vires*, it is not intended that they are unlawful (*qu. illegal?*), or even such as the corporation cannot perform; but merely those which are not within the powers conferred upon the corporation by the act of its creation." C. J. SAWYER, in the California case cited above, describes the term as containing several degrees of incapacity. An act is *ultra vires* absolutely, when not within the scope of the corporate powers, under any circumstances, or for any purpose. "An act is, also, sometimes said to be *ultra vires* with reference to the rights of certain parties, when the corporation is not authorized to perform it without their consent; or with reference to some specific purpose, when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose." This subdivision and gradation of the incapacity designated by the phrase *ultra vires*, can, in my opinion, produce only confusion. It is better to confine the term to the absolute sense given to it above. Indeed, where the incapacity depends upon some special circumstances, and does not exist under others, the act cannot be correctly called *ultra vires*.

brought by or against the corporation. In the first and second classes of suits there can be no doubt that acts in excess of corporate powers will be made the ground of relief; but we are only concerned with those of the third class. How far the defense of *ultra vires* will be admitted in actions brought to enforce contracts made by corporations, is a question which has given rise to much discussion and to great conflict of judicial opinion. At one time, the defense was favored under the notion that corporations would thereby be kept within the scope of their legitimate functions. Not only in suits by a corporation, but also in suits against a corporation, and even when the defendant had received and retained all the benefit of the transaction, the defense that the contract was *ultra vires* was admitted, and made the basis of refusing a recovery.(1)

But, in more recent times, the tendency, both of the English and of the American courts, has been in another direction; and, in one of the very latest American decisions, the doctrine is laid down by the court as now settled that, in actions upon contracts, either by or against corporations, where the defendant has received the benefit resulting from the agreement, it is no defense that the contract was not within or incidental to the chartered powers or the purposes for which the corporation was created; and that the defense of *ultra vires*, as a general rule, will not prevail for or against a corporation when it will not advance justice, but, on the contrary, will accomplish a legal wrong.(2) If the defendant has received the benefit of the agreement, it would be a glaring injustice to allow a recovery on the contract to be defeated, and the benefit to be retained by sustaining the defense of *ultra vires*, especially as such defense is a matter which only concerns the corporation in its relations with the state and government. If, however, the contract is wholly executory on both sides; if it consists merely in mutual promises, and neither of the parties has given up or received any property in pursuance of its stipulations, there are not the same reasons for rejecting the defense, and the doctrine of the earlier cases will still apply and prevent a

(1) See the cases cited in the first note under this paragraph.

(2) *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 68, 69; and see *Ex parte Chipendale*, 4 De G., M. & G. 19; *In re National, etc., Building Soc.*, L. R., 5 Ch. 309; *In re Cork, etc., Ry. Co.*, L. R., 4 Ch. 748; *Eastern Co. Ry. Co. v. Hawkes*, 5 H. L. Cas. 381, per Lord St. LEONARDS; *Bissell v. Mich. So. etc.*, R. R., 22 N. Y. 258; *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543. In the last two cases, the subject is discussed in a most exhaustive manner. *Buffet v. Troy and Boston R. R.*, 40 N. Y. 168.



recovery. In the case of municipal corporations, it is settled that the strict rule should be enforced, and the defense of *ultra vires* should prevail. The reason of this distinction is found in the different nature and objects of the corporations themselves. Municipal corporations are parts of the government; all their powers are held in trust for the public; the public, the state itself, is interested in all their acts; and the rights of the public, which are paramount over all private rights, are protected by keeping these local governmental bodies within the exact limits of their powers.(1)

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## SECTION II.

*The contract must be upon a valuable consideration.*

SECTION 57. It is a fundamental principle, that equity will not decree the specific execution of a contract, unless the undertaking to be enforced is founded upon a valuable consideration, moving from the party on whose behalf the performance is sought; in other words, the remedy cannot be obtained for a merely voluntary agreement.(2) The common-law rule is theoretically the same, for it does not allow the seal to take the place of a consideration, but to raise a conclusive presumption of its presence. Equity, disregarding mere forms, and looking at the reality, always requires an actual consideration, and permits the want of it to be shown, notwithstanding the seal, and applies this doctrine to covenants, settlements, and executory contracts of every description.(3) In most of the states, the common-law

(1) Dillon on Munic. Corp., §§ 381, 749, and cases cited.

(2) *Cochrane v. Willis*, 34 Beav. 359; *Groves v. Groves*, 3 Y. & J. 163; *Houghton v. Lees*, 1 Jur. (N. S.) 862 (STUART, V. C.); *Ord v. Johnston*, 1 Jur. (N. S.) 1063 (STUART, V. C.); *Shepherd v. Shepherd*, 1 Md. Ch. 244; *Valser v. Valser*, 23 Miss. 378; *Minturn v. Seymour*, 4 Johns. Ch. 497; *Burling v. King*, 66 Barb. 633; *Curlin v. Hendricks*, 35 Tex. 225; *Butman v. Porter*, 100 Mass. 337 (where the consideration failed). Mutual promises to convey are a sufficient consideration. *Murphy v. Rooney*, 45 Cal. 78. See *Ferry v. Stephens*, 66 N. Y. 321, where a contract was enforced, although no price had been, in fact, paid, or was intended to be paid, the vendee having, in the written agreement, *promised* to pay a certain sum, and the vendor having given a receipt in full for such sum.

(3) *Jeffreys v. Jeffreys*, Cr. & Ph. 138; *Hervy v. Audland*, 14 Sim. 531; *Meek v. Kettlewell*, 1 Ph. 342; 1 Ha. 464. In *Ord v. Johnston*, 1 Jur. (N. S.) 1063, 1065, V. C. STUART said: "This court never interferes in support of a purely voluntary agreement, or where no consideration emanates from the individual seeking the performance of the agreement." In *Houghton v. Lees*, 1 Jur. (N. S.)

efficacy of the seal has been abolished by statutes. It is made to create a *prima facie* presumption only of a valuable consideration,

862, 863, the same able equity judge said: "Of the general doctrine of the court, on this subject, there is no doubt whatever. This court will not perform a voluntary agreement, or, what is more, a voluntary covenant under seal. Want of consideration is a sufficient reason for refusing the assistance of the court." The full doctrine was stated by Lord Ch. COTTENHAM, while refusing to enforce a voluntary settlement, in *Jefferys v. Jefferys*, Cr. & Ph. 138, 141: "I have no doubt that the court will not execute a voluntary contract; and my impression is, that the principle of the court, to withhold its assistance from a volunteer, applies equally whether he seeks to have the benefit of a contract, a covenant, or a settlement." The same principle is recognized or applied in most of the older cases. See *Wycherley v. Wycherley*, 2 Eden, 177, per Lord NORTHINGTON; *Fursaker v. Robinson*, Prec. in Ch. 475; *Peacock v. Monk*, 1 Ves. Sen. 133; *Underwood v. Hitchcox*, 1 Ves. Sen. 280; *Griffin v. Nanson*, 4 Ves. 344; *Penn v. Lord Baltimore*, 1 Ves. Sen. 450; *Williamson v. Codrington*, 1 Ves. Sen. 514; *Stapilton v. Stapilton*, 1 Atk. 10. In a few of the early cases, before the jurisdiction of equity was clearly settled, it was held that voluntary agreements, if *under seal*, should be enforced; but these decisions and dicta have long since been overruled; as, for example, see *Beard v. Nutthall*, 1 Vern. 427; *Wiseman v. Roper*, 1 Ch. Cas. 84; *Tyrell v. Hope*, 2 Atk. 562; *Edwards v. Countess of Warwick*, 2 P. Wms. 176; *Husband v. Pollard*, cited in 2 P. Wms. 467. In *Estate of Webb*, 49 Cal. 541, 545, per CROCKETT, J.: "In such cases the point to be determined is, whether the trust has been perfectly created, that is to say, whether the title has passed and the trust been declared, and the trust being executed, nothing remains for the court, but to enforce it. In discussing this question, the court say, in *Stone v. Hackett*, 12 Gray, 227: 'It is certainly true that a court of equity will lend no assistance toward perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding, so long as it remains executory. But it is equally true, that if such a contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of title, the relation of trustee and *cestui que trust* is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery.' The same proposition is announced, and the authorities fully collated and examined, in *Kekewich v. Manning*, 1 DeG. M. & G. 176; *Jones v. Lock*, L. R. 1 Ch. 25, and *Wason v. Colburn*, 99 Mass. 342. \* \* \* This was not an executed trust, but at most nothing more than a voluntary, executory agreement to create a trust *in futuro*, and such agreements cannot be enforced in equity." There is, however, a distinction in respect to the consideration, between *executed* and *executory* agreements. Executed agreements, although voluntary, may raise a trust which will be enforced in equity. An executory agreement, in order to be enforced, must have a valuable consideration. Even in the first class, it is not the *agreement itself* which is specifically enforced, and the jurisdiction of equity over them belongs to the doctrine of trusts. See *Bunn v. Winthrop*, 1 John. Ch. 329; *Hayes v. Kershaw*, 1 Sandf. Ch. 258; *Meek v. Kettlewell*, 1 Ph. 342; 1 Ha. 464; *McFadden v. Jenkins*, 1 Ha. 462; *Fletcher v. Fletcher*, 4 Ha. 67; *Hill v. Gomme*, 1 Beav. 540; *Davenport v. Bishop*, 2 Y. & C. C. C. 451; *Collinson v. Patrick*, 2 Keen, 123; *Godsal v. Webb*, ib. 99; *Colyear v. Countess of Mulgrave*, ib. 81; *Doungsworth v. Blair*, 1 Keen, 795; *Blakely v. Brady*, 2 Dr. & Wal. 311.

which may be overcome by evidence; and this statutory effect is extended to all actions founded upon contract, whether legal or equitable. The practical result of this legislation is, that in actions upon sealed agreements, the burden of proof, in regard to a consideration, is shifted from the plaintiff to the defendant.(1) Although there must be a valuable consideration, it need not be pecuniary. In family arrangements, agreements for the settlement of actual or possible controversies, and the like, a slight consideration is sufficient, and the court requires but little to uphold and enforce a compromise fairly and deliberately made. In all such cases the contract is, of course, not a "voluntary" one.(2)

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### SECTION III.

*A contract must be actually concluded between the parties, with the requisite formalities; there must be an "aggregatio mentium" upon the same matters.*

SECTION 58. A contract must be actually concluded, for otherwise there are no rights upon which the equitable remedy can operate. "An agreement is the result of the mutual assent of two parties to certain terms, and if it be clear that there is no *consensus*, what may have been written or said becomes immaterial."(3) Whenever, therefore, the transaction has not passed beyond the condition of negotiation or treaty, there can be no specific performance. And if it is left

(1) R. S. of N. Y. v. 2, p. 406, § 77: "In every action upon a sealed instrument, and when a set-off is founded upon any sealed instrument, the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner and to the same extent, as if such instrument were not sealed." See, construing this section, *Wilson v. Baptist Education Soc.*, 10 Barb. 308; *Alabama*—Rev. Code (1867), p. 526, § 2632; *Michigan*—Comp. Law (1871), v. 2, p. 1710, § 90; *Oregon*—Gen. Laws (1872), p. 258, § 743; *Texas*—Pasch. Dig. v. 1, § 228. In several states, the distinction between sealed and unsealed instruments is abolished, and a want of consideration can always be shown as a defense, except in the ordinary case of negotiable paper. *California*—Civ. Code, § 1629; *Indiana*—2 R. S. (G. & H.) p. 180, § 273; *Iowa*—Rev. Code (1873), p. 383, §§ 2112, 2113, 2114; *Kansas*—Gen. Stat. (1868) p. 183, §§ 6, 7, 8; *Kentucky*—1 R. S. (Stanton's) p. 267, §§ 2, 3; *Nebraska*—Gen. Stat. (1873) p. 1001; *Tennessee*—Gen. Stat. (1871) §§ 1804, 1806; *Texas*—Pasch. Dig., v. 1, § 5087 (on contracts and conveyances "respecting real or personal property").

(2) For an illustration, see *Houghton v. Lees*, 1 Jur. (N. S.) 862.

(3) Per Ld. Ch. WESTBURY, in *Chinnock v. Marchioness of Ely*, 4 De G., J. & S. 638, 643.

doubtful, from all the evidence in a case, whether a contract was concluded or not, equity will not grant its specific relief.(1) When the parties have, at the same time, executed a written instrument which sets forth, in a formal manner, the terms of the agreement, there can hardly be any doubt or difficulty as to the fact of its actual conclusion. The practical questions connected with this branch of the subject arise upon contracts which are claimed to have resulted from negotiation, correspondence, conversation, or other analogous acts, through which the final assent of the parties to the same terms may be brought about and expressed. The various modes through which the agreement of the two minds may be produced, the mutual assent reached, and contract thereby concluded, may be reduced to a few generic classes; and I shall examine the important questions presented by each class separately.

SEC. 59. 1. *Offer and acceptance*.—Contracts resulting from negotiations, whether written or verbal, when reduced to their elements, generally consist of an offer and an acceptance. The general rules, to which attention is now called, are equally applicable, whether the offer and acceptance are made and the negotiation conducted by writings or by conversation; the particular modifications introduced by the requirements of the statute of frauds will be considered in a subsequent part of the section. An offer or proposal made by one party, and the acceptance thereof by the other, constitute a contract; in other words, a contract is thereby concluded, so that it may be enforced.(2) By these means the minds of the parties meet, and their mutual assent is obtained in respect to the same terms and subject-matter. I shall discuss: 1, the nature and incidents of the offer; 2, the nature and incidents of the acceptance; and 3, the time when they become effective in producing a contract.

SEC. 60. *Nature and incidents of the offer*.—The offer or proposal has, before acceptance, no binding force or effect. Even when promissory in its form, it is, at most, a unilateral promise, without consideration. It is an act of one party alone, and requires the corresponding act of the other party in order to produce the mutual assent, and to give it a legal validity as a constituent part of a contract. When the proposal is in writing, it acquires, as such, no higher or more compulsory character. It has none of the qualities which

(1) *Stratford v. Bosworth*, 2 V. & B. 341; *Huddleston v. Briscoe*, 11 Ves. 583, 591; *Carr v. Duval*, 14 Pet. 77.

(2) *Kennedy v. Lee*, 3 Mer. 441.

belong to a written memorandum of an agreement.(1) The offer is, while it remains such, completely under the control of the person who makes it.

SEC. 61. *How may it be terminated?*—The proposal may be ended by a withdrawal; by a refusal on the part of the person to whom it is made; and by an unreasonable delay; and, after it is thus terminated, no acceptance or offer to accept is operative *By withdrawal.* As the offer is not in any sense binding, the person who makes it may, at any time before a valid acceptance has changed its character, withdraw it and thus put an end to the negotiation; he can do this whatever be its form, whether promissory or not, and without any reason except his own will.(2) Although the person to whom the offer was made may have intended, and even attempted, to accept, still if the acceptance was for any reason imperfect and not binding, so that no contract

(1) In *Warner v. Willington*, 3 Drew. 531, V. C. KINDERSLEY said: "In the case of an offer, no doubt the party signing it may, at any time before acceptance, retract; but if it be an agreement, though signed by one party alone, he cannot retract at his pleasure, but all he can do is to call upon the other party to sign or rescind the agreement. A memorandum of an agreement supposes that the two parties have verbally made an actual contract with each other; and when the terms of such contract are reduced into writing and signed, that is sufficient to bind the party signing; but if the memorandum is of an offer only, that assumes that there has been no actual contract between the parties." And see *Meynell v. Surtees*, 1 Jur. (N. S.) 737; *Horsfall v. Garnett*, 6 W. R. (1857-8), 387; *Tucker v. Wood*, 12 John. 190; *Bower v. Blessing*, 8 S. & R. 243. In *Rummens v. Robbins*, 3 De G., J. & S. 88, the offer was, in form, a contract of sale containing special clauses, submitted by the owner to the proposed purchaser for his approval. L. J. KNIGHT BRUCE said (p. 95): "It was requisite that the plaintiff's accession to these terms [of said proposed contract] should be obtained; and until that accession should be obtained, this contract was a mere proposal—a mere proposal of terms by a person not then bound."

(2) *Dickenson v. Dodds*, L. R. 2 Ch. D. 463; *Rummens v. Robbins*, 3 DeG. J. & S. 88, 95; *Thornbury v. Bevill*, 1 Y. & C. C. C. 554; *Meynell v. Surtees*, 1 Jur. (N. S.) 737; *Warner v. Willington*, 3 Drew. 523; *Mactier v. Frith*, 6 Wend. 103. In *Rummens v. Robbins*, 3 DeG. J. & S. 88, an offer in the shape of a contract submitted to the proposed purchaser for his approval, was withdrawn before acceptance by the intended vendor, by means of a written notice; per L. J. KNIGHT BRUCE, p. 95: "Now this was what the writers of the letter had a right to do, for they were not bound until their proposal was capable of being validly accepted and had been accepted, and two months had passed without the plaintiffs intimating any acceptance. The attorneys then on behalf of the vendors were acting in the clear exercise of their right in withdrawing the proposal and in refusing to have anything more to do with it. It was then in vain for the plaintiff to carry on a correspondence according to the proposed contract which had been left two months without being acceded to."

was concluded, the power of withdrawal remains unaffected.(1) If the offer, in express terms, specifies the time within which the acceptance may be or must be made; or, in other words, states the period during which it will remain open, the power of withdrawal is not thereby restricted, but may be exercised at any time before an acceptance and before the limitation has expired.(2) No formal notice is necessary to constitute a withdrawal. It is sufficient that the person making the offer does some act inconsistent with it—as, for example, sells the property in question to another purchaser, and that the person to whom the offer was made has knowledge of such act. Indeed, it appears that a sale of the property to a third person would, of itself, be a withdrawal, although made without the knowledge of the originally intended vendee.(3)

SEC. 62. *By a refusal.*—A refusal to accept by the person to whom the proposal is made, terminates the offer, and no subsequent readiness to accept or acceptance will avail to conclude a contract upon the basis of such original offer.(4) The proposer may, of course, renew and thus commence the negotiation. It would appear that, to

(1) In most of the cases which turn upon a withdrawal, it will be found that there was some attempt to accept—some act claimed to have been an acceptance. *Rummens v. Robbins*, 3 DeG. J. & S. 88; *Warner v. Willington*, 3 Drew. 523.

(2) *Routledge v. Grant*, 4 Bing. 653; *Cooke v. Oxley*, 3 T. R. 653; *Dickenson v. Dodds*, L. R. 2 Ch. D. 463; *Boston & Me. R. R. v. Bartlett*, 3 Cush. 224. In *Dickenson v. Dodds* the owner of property signed a paper which purported to be an agreement to sell at a fixed price, but included: "This offer to be left over until Friday, 9 A. M." Before that time he sold the property to another person. After this sale, the one to whom the first offer was made announced his acceptance, and brought an action to compel a specific performance. *Held*, that the offer was properly withdrawn, and that no contract arose from the plaintiff's subsequent acceptance. In *Boston & Me. R. R. v. Bartlett*, an offer was given to sell certain land at a specified price, the answer to be given in thirty days. *Held*, that such offer was a continuing one; "during the whole of that time it was an offer every instant;" but it might be withdrawn at any time before acceptance. If unrevoked at the time of acceptance, it would become a concluded contract.

(3) *Dickenson v. Dodds*, L. R. 2 Ch. D. 463. Facts are stated in the last note. *Held*, that an offer to sell may be withdrawn before acceptance without any formal notice to the party to whom it was made. It is sufficient if that person has knowledge that the vendor has done some act inconsistent with the offer—*e. g.*, selling the property to a third person. *Semble*, a sale to a third person would be a withdrawal, even though the first vendee had no knowledge of it. The act of the vendor, in this case, amounted to an offer which was effectually withdrawn.

(4) *Hyde v. Wrench*, 3 Beav. 334; *Frith v. Lawrence*, 1 Paige, 434.

produce the effect above mentioned, the refusal must be positive, intended as a rejection, and not merely as a suggested modification of the proposed terms, while the original offer remains in abeyance, to be further considered and perhaps accepted, if the suggestion is not approved. There are many cases in which the offer as first made has been accepted, and a contract thereby concluded, after alterations in it had been unsuccessfully attempted by the intended purchaser. In all such cases the offer must, of course, remain unrevoked. As the person to whom an offer is made, may, instead of accepting or rejecting it, suggest some variation or addition, so the original proposer may, instead of wholly withdrawing his offer, modify it at any time and in any manner before acceptance, by adding, omitting, or altering terms, and in either case the transaction continues to be mere negotiation until the point is reached where an offer as made on one side is accepted on the other, and a contract is thereby concluded.(1) *By delay.* The offer is, also, terminated by unreasonable delay on the part of the person to whom it is made. This proposition is identical with the rule that the acceptance must be made within a reasonable time, the discussion of which is found in a subsequent paragraph.(2)

SEC. 63. *Nature and incidents of the acceptance.*—As the acceptance is the means by which the minds of two parties are brought to an agreement, it must be so expressed as to show that there is an actual *assent*, a meeting of the two minds, and that there is an assent upon exactly the same matters. To produce a concluded contract the

(1) *Honeyman v. Marryatt*, 21 Beav. 14; 6 H. L. Cas. 112, illustrates such a variation by the vendor. Marryatt advertised an estate for sale. Honeyman proposed to purchase it and offered to pay a certain price. M's agent wrote, April 4th, to H's solicitor: "Mr. M. has authorized us to accept the offer, subject to the terms of a contract being arranged between his solicitor and yourself. Mr. M. requires a deposit of from 1,200*l.* to 1,500*l.*, and the purchase to be completed at midsummer day next." A correspondence followed, H. objecting to the deposit. M., thereupon, before any acceptance, required 1500*l.* deposit, and the purchase to be completed on April 27th, and that the deposit should be paid and the agreement signed before a given day or the treaty would be at an end. H. did not comply with these terms, but subsequently offered to pay the deposit and sign the agreement, which M. refused. On a bill filed by H. the M. R. held that the words, "subject to the terms of a contract being arranged between his solicitor and yourself," prevented the letter of April 4th from constituting an absolute contract, and that M. had a right afterwards to add the terms as to the deposit and the day for completing the contract; and so dismissed the bill. This decision was affirmed in the House of Lords.

(2) See *infra*, § 65.

acceptance must, therefore, possess certain fundamental requisites. *First*. It must be absolute, unambiguous, unequivocal, without condition or reservation.(1) There is an apparent, but not real, limitation

(1) *Chinnock v. Marchioness of Ely*, 4 DeG. J. & S. 638; 646; *Crossley v. Maycock*, L. R. 18 Eq. 180; *Kennedy v. Lee*, 3 Mer. 441; *Thornbury v. Beville*, 1 Y. & C. C. C. 554; *Gaskarth v. Lord Lowther*, 12 Ves. 107; *Warner v. Willington*, 3 Drew, 523; *Horsfall v. Garnett*, 6 W. R. (1857-8) 387; *Thomas v. Blackman*, 1 Coll. C. C. 301. In *Crossley v. Maycock*, *supra*, plaintiff had made an offer to purchase. The vendors answered by a letter acknowledging the receipt of such offer, and adding: "Which offer we accept, and now hand you two copies of conditions of sale," and inclosed a formal agreement containing special conditions. In a bill for specific performance by the vendee, this was held by JESSEL, M. R., to be only a conditional acceptance, and that no contract was concluded by it. In *Chinnock v. Marchioness of Ely*, *supra*, defendant authorized an agent to offer her house for sale at 10,000*l.*, but gave him no authority to enter into a contract. The plaintiff gave this agent the following writing: "November 11, 1863. I agree to give you the price which you are authorized to accept for this house, etc. (description), viz., 10,000*l.*, to include the usual tenants fixtures; possession as early in March as can be arranged. I shall be obliged, if you would forward me the usual contract" (signed, etc.). This did not constitute a contract, for plaintiff was informed that the agent had no authority. This writing was, in fact, an offer from the plaintiff. The defendant, at this period of the negotiation, changed her mind, and did not want to sell, but was willing to proceed if her solicitor thought she could not honorably recede. The plaintiff declining to abandon the intended purchase, the defendant's solicitors wrote him the following letter: "Nov. 19th, 1863. F. Chinnock, Esq. We have been instructed by the Marchioness of Ely to proceed with the sale to you of these premises. The draft contract is being prepared, and will be forwarded to you for approval in a few days" (signed, etc.). Plaintiff, on a bill for a specific performance, claimed that this last letter was either a clear recognition of the fact that there had been a complete sale to the plaintiff, or else it amounted to an acceptance of plaintiff's offer in his letter dated November 11th. Of this contention, Ld. Chancellor WESTBURY said, p. 645: "It is clear, in the first place, that if at the time of writing this letter there was no sale, in the sense of concluded contract, between the plaintiff and defendant, then the words 'to proceed with the sale,' fairly interpreted, must mean to go on with matters as they then stood; and if they were then in treaty only, the words will mean to go on with that treaty. My judgment is, that the words mean merely 'we are instructed to go on,' and that they were written with reference to the fact that the former proceedings had been interrupted by a temporary change of purpose on the part of the defendant. But whether the words are taken in the one sense or the other, they cannot be severed from the rest of the letter, which describes the manner in which the sale was to be proceeded with, viz., by the preparation of a draft contract which should be forwarded to the plaintiff for approval. Putting, therefore, the plaintiff's own interpretation on the first sentence of the letter, but adding to it that which follows, the fair and just meaning and effect of the whole letter will be: 'We will accept your terms of purchase, if you agree to the draft contract we are about to send to you.' So construed, the approval of the draft contract is a term of the defendant's assent." The Lord Chancellor then admits the correctness of a rule



upon this doctrine, which should be noticed in this connection. A contract may be concluded and binding, although, by its very terms or by a collateral stipulation, something more is to be done in order

to be stated hereafter, and proceeds: "But if to a proposal or offer an assent be given, subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation. And this appears to me to be the real state of the case before me, for I am clearly of opinion that the true and fair meaning and legal effect of the letter of the 19th November, may be expressed in these words: 'I will go on with the treaty for the sale to you of my house, and for that purpose will send to you the form of the contract which I am willing to enter into.' I take, therefore, the letter of the 19th November, either as a conditional acceptance of the plaintiff's terms, subject to the draft contract being agreed to, or as an expression of willingness to continue the negotiation, and for that purpose to propose a form of agreement." The case of *Ridgway v. Wharton*, 6 H. L. Cas. 238, is very instructive, although the discussions largely turned upon disputed questions of fact. The plaintiff had a negotiation with an agent of the defendant for a lease; certain preliminaries, at least, were agreed upon, and these terms were sent to a solicitor for him to draw a contract. The principal matter in dispute was whether plaintiff and the agent had concluded any contract which was simply to be put into shape by the solicitor, or whether no final agreement was concluded, but the solicitor was to draw up one which would be presented to the plaintiff for his acceptance. A majority of the judges reached the latter conclusion from the evidence. Lord WENSLEYDALE, in his opinion, laid down the following general doctrines (p. 305): "An agreement to be finally settled must comprise all the terms which the parties intend to introduce into the agreement. An agreement to enter into an agreement upon terms to be afterwards settled between the parties, is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled. Until those terms are settled, he is perfectly at liberty to retire from the bargain. Now, in this case it is clear that, from the first, this was not an agreement for a lease, which lease, according to the state of the law at that time, must have been a lease by deed, but merely an agreement to enter into an agreement to be afterwards drawn up by a solicitor. Then that comes to a pure question of fact, whether the parties intended that the agreement to be so drawn up should embody what they agreed upon, and that they should not be bound till the formal agreement is entered into, or whether they meant to agree by parol; but agreeing upon all the terms first, they meant afterwards to reduce it into writing as a memorial. \* \* \* If two parties have agreed or talked together upon an agreement, and it is understood between them that that agreement is to be reduced into writing, nothing binds them but that writing. If parties agree finally to be bound by any terms, and then, for the sake of possessing a memorial, having agreed to be bound by the original terms, they get a document drawn up, there is no doubt that they are bound by the original terms, provided they are such terms as can be binding without writing, and are not void under the statute of frauds. The formal document is only ancillary. If the original understanding is that the terms are to be reduced into writing, and that the parties are not to be bound until the terms are reduced into writing, then each party has a right to withdraw before the agreement is signed. But if the terms are agreed upon by parol, and the writing is

to carry out the intention of the parties, but still there is nothing conditional or ambiguous in the mutual assent. It is, therefore, a settled rule that if an agreement has been actually concluded, it is nevertheless binding, although the parties have declared that it is to

meant to record the transaction and to preserve a memorial of it, in that case they are bound; and if it becomes essential to satisfy the statute of frauds, you may oblige them to sign the memorial, provided you have sufficient to bring it within the statute of frauds. Here the question would be simply: Did the parties mean that the attorney should draw up the agreement because they had finally agreed upon the terms, and merely wanted a formal document, or were the parties negotiating for an agreement for a lease to be drawn up by an attorney? Now the impression, in my mind, is that this is a negotiation for an agreement for a lease; that the parties understood that they were to reduce it into writing, and that it would not operate at all till it was reduced into writing. The terms were agreed upon, to a certain extent, and they were sent to be drawn up by an attorney. There was a great deal to be done before the lease was to be granted, because the terms of the lease were to be arranged. Was it not open to the defendant to put into the lease every sort of stipulation? Then how can it be binding finally till the agreement was drawn up specifying the terms which the lease was to contain, and introducing everything which the parties would wish to introduce? \* \* \* I come to the conclusion that there was nothing whatever but an agreement for a lease, in which lease alterations might be introduced, and which it was evidently the intention of the defendant should be introduced, to which it is by no means certain the plaintiff would have agreed; therefore, the agreement is incomplete." Lord ST. LEONARDS said, on this same subject (p. 288): "If the terms of an *agreement* are sent to a solicitor to prepare an agreement, that is binding. The solicitor has not the slightest power to alter any one of those terms which are thus sent to him as instructions to prepare a formal document. He is bound mechanically to perform the duty of preparing a lease according to those terms. \* \* \* Where an agreement is established by a plaintiff, any formal matters incidental to the agreement may be supplied just in the same way as in an original agreement. Your lordships will find that laid down, among other authorities, in *Stratford v. Bosworth*, 2 V. & B. 345." See, also, per Ld. Ch. CRANWORTH, pp. 264, 265. The offer and the acceptance must leave nothing to be arranged in future in order to make a complete contract. In *Potts v. Whitehead*, 5 C. E. Green (20 N. J. Eq.) 55. A written offer to convey land within a fixed time, at a price named, of which a part was to be paid on the execution of the deed, and the residue was to be secured by bond and mortgage on the land at 6 per cent, was accepted. *Held*, that as no time for the payment of this balance was stated, an essential part of the contract was thus left undetermined to be settled by future negotiation, and, therefore, no contract was concluded which could be enforced by the one accepting. In *Matteson v. Scofield*, 27 Wisc. 671, the vendor offered by letter to sell certain land for \$3,200, \$1,000 down and \$500 annually, with interest, this balance "to be secured by mortgage." The vendee's unconditional acceptance of this by letter was held to make a concluded contract, as the terms of the offer fairly implied that the land was to be conveyed to the vendee on his payment of the \$1,000, and the mortgage for the balance was to be given upon the land so conveyed. See, also, *Goodale v. Hill*, 42 Conn. 311; *Lanz v. McLaughlin*, 14 Minn. 72.

serve only as instructions for a more formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties.(1) This rule is entirely independent of

(1) *Ridgway v. Wharton*, 6 H. L. Cas. 238, 264, 265; *Chinnock v. Marchioness of Ely*, 4 DeG. J. & S. 638, 645, 646, per Lord Ch. WESTBURY; *Fowle v. Freeman*, 9 Ves. 351; *Kennedy v. Lee*, 3 Mer. 441; *Thomas v. Dering*, 1 Keen, 729; *Tawney v. Crowther*, 3 Bro. C. C. 161, 318. See observations on last case by Lord REDENDALE in *Clinan v. Cooke*, 1 Sch. & Lef. 22, 33. Lord WESTBURY's language, at the place cited, is: "I entirely accept the doctrine that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the statute of frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement; or, although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged, or his agent lawfully authorized, there exist all the materials which this court requires to make a legally binding contract." Lord Chan. WESTBURY here connects the rule with the requirements of the statute of frauds, which, in a large majority of instances, will, in fact, be applicable. Lord Chancellor CRANWORTH, in *Ridgway v. Wharton*, 6 H. L. Cas. 238, 264, 265, states it in its proper generality: "I quite agree with the doctrine, as being a good doctrine, both in law and at equity, that if parties have entered into an agreement, they are not the less bound by that agreement because they say: 'We sent it to a solicitor to have it reduced into form.' But when the parties negotiate and do not say so, the mere fact that they do send it to a solicitor to have the matter reduced into form, affords to my mind, generally, cogent evidence that they do not intend to bind themselves till it is reduced into form. That, however, is a question of fact which must depend upon the circumstances of each particular case. \* \* \* (p. 268). I again protest against its being supposed, because persons wish to have a formal agreement drawn up, that, therefore, they cannot be bound by a previous agreement, if it is clear that such an agreement has been made; but the circumstance that the parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement." In the leading case of *Fowle v. Freeman*, 9 Ves. 351, the parties had been negotiating, Fowle for the purchase and Freeman for the sale of an estate. Finally they met, and Freeman signed the following document: "I agree to sell to Mr. Fowle my estate, titles, and manor at Chute Lodge, together with the woods, trees and fixtures, except Cadley Cottage, for the sum of 27,000*l.*, upon the following conditions"—stating several conditions. He then added a letter to his solicitor, desiring him to prepare a proper agreement for Mr. Fowle and himself to sign, and to deliver to the bearer an abstract of his title. Fowle having accepted the offer, Sir WILLIAM GRANT held that there was a concluded contract, to all intents and purposes. They might well wish to have it in a more formal shape, but the direction to the solicitor to hand over the abstract of title, and Freeman signing the agreement, made it perfectly clear that the parties meant that agreement to bind them, although the formal agreement was to be signed afterwards. See, also, *Cowley v. Watts*, 17 Jur. 172; *Gibbins v. North Eastern, etc., Asylum*, 11 Beav. 1; *Skinner v. McDouall*, 2 De G. & Sm., 265. In *Gibbins v. North East-*

the statute of frauds, because it relates directly to the nature of the assent which is the substance of a contract, and not to the written form in which that assent may be expressed. In applying it a difficult question of fact may arise, whether the parties have finally assented to terms which they have agreed shall be embodied in a formal document, or whether they have simply agreed that a document shall be prepared to the terms of which their assent must hereafter be given.

SEC. 64. *Second.* As the assent of the parties should be given to exactly the same matters, the acceptance must not vary from the terms of the offer, either by way of omission, addition, or alteration; if it does vary in either of these modes, no contract is concluded thereby, the transaction remains in the state of negotiation, and neither party is bound.<sup>(1)</sup> This rule itself is clear; the practical question is: What amounts to a fatal variation? The most common form consists in the addition of a new term. Whenever the acceptance contains a substantive term not found in the offer, and not being in response to anything intentionally left by the offer to be decided in that manner, there is plainly no *consensus* of minds, and no con-

cern, etc., *Asylum*, one party wrote: "I offer you 3,000*l.* for the estate." The other replied: "I accept your offer, and if you approve of the inclosed, sign the same, and I will, on receipt of the deposit, sign you a copy." The inclosure was not produced, but the court held the contract concluded by the letters, and the inclosure as merely the means of carrying it into effect. In *Skinner v. McDouall*, a party having made an offer to take a lease of a house, the agent of the owner wrote thus: "These terms I have submitted to Mrs. S. [the owner], and I am authorized to say that they are accepted, and that her solicitor will draw up a proper agreement for signatures, which I will forward you." The offer and this letter were held to constitute a binding contract.

(1) *Honeyman v. Marryatt*, 6 H. L. Cas. 112; 21 Beav. 14; *Kennedy v. Lee*, 3 Mer. 441; *Routledge v. Grant*, 4 Bing. 653; *Meynell v. Surtees*, 3 Sm. & Giff. 101; 1 Jur. (N. S.) 737; *Hall v. Hall*, 12 Beav. 414; *Lucas v. James*, 7 Ha. 410; *Duke v. Andrews*, 2 Exch. 290; *Hazard v. New Eng. Marine Ins. Co.*, 1 Summ. 218; *Carr v. Duval*, 14 Pet. 77; *Vassar v. Camp*, 11 N. Y. 441. Several of these cases were at law, but they serve to illustrate the doctrine, which applies as well in equity as at law. In *Routledge v. Grant*, *supra*, the offer was to purchase a house on certain terms, including one that possession should be given on or before the twenty-fifth of July, then next; the acceptance, by the vendor, varied from the offer solely in undertaking to give possession on the first of August, and it was held that no contract was concluded thereby. In *Meynell v. Surtees*, where a land owner offered a right of way to a railway company for mineral traffic only, and the company accepted it for the purpose of building a line to be used for general public traffic, it was held that no contract had been entered into, on account of this variation from the proposal. See *Matteson v. Scofield*, 27 Wisc. 671, where it was held that the acceptance contained no substantial variation.

cluded contract.(1) Every provision in the acceptance, however, which is not embraced in the offer, does not necessarily constitute a substantive new term, and so prevent the requisite mutual assent. The proposal itself may expressly provide for such an additional feature to come from the other party, or even from a third person, and to form a portion of the completed contract. If, for example, the offer should leave some term to be determined in such a manner, an acceptance which made the decision would create a contract, since the proposer would, expressly or impliedly, agree to be bound thereby, and the assent would thus be mutual.(2) The parties may, also, by the offer and the acceptance, stipulate that the price shall be fixed by valuers, or that a provision of the contract shall be finally settled by third persons, or in any other method, as agreed.(3) The introduction, in the acceptance of a new term which is entirely nugatory, will not of itself defeat the contract;(4) nor of a clause providing for the subsequent

(1) *Honeyman v. Marryatt*, 6 H. L. Cas. 112; 21 Beav. 14. M. advertised an estate for sale. H. proposed to buy, and offered a certain price. M.'s agent, thereupon, wrote to H. the following letter: "Mr. M. has authorized us to accept the offer, subject to the terms of a contract being arranged between his solicitor and yourself. Mr. M. requires a deposit of from 1,200*l.* to 1,500*l.*, and the purchase to be completed at Midsummer Day next." No reply being made to this letter, it was held there was no completed contract on which to sustain a suit for a specific performance. In *Chinnock v. Marchioness of Ely*, the facts of which are stated, *supra* (§ 63 n.), the defendant's letter of November nineteenth, if an acceptance of the plaintiff's prior offer of May eleventh, contained an additional term, that the contract to be prepared by the defendant's solicitor must be assented to by the plaintiff. In *Holland v. Ayre*, 2 S. & S. 194, defendant proposed certain terms for a lease, which plaintiff accepted, but offered an under lease, and it was held that no contract resulted. In *Lucas v. James*, 7 Ha. 410, a series of alternate additions on each side ended without any completed contract. Plaintiff had proposed an agreement, which provided, among other things, that a lease should contain all the covenants in the superior lease; defendant accepted this agreement with the reservation that the superior lease should not contain any unusual clause; a draft of the proposed lease being then submitted to defendant, he returned it, with some alterations, to plaintiff's solicitors, who consented to all of them, except one, which related to an assignment without permission of the lessor. It was held that there was no contract, and the intended lessee was entitled to abandon the negotiation. In *Duke v. Andrews*, 2 Exch. 290, where an offer was made to take certain railway shares, and a letter accepting such offer was headed, "not transferable," these words constituted a new term in the acceptance, so that the parties were not bound by a completed agreement.

(2) *Boys v. Ayerst*, 6 Mad. 316. An offer left a day to be named by the other party, and his acceptance designated the day.

(3) See *Walker v. Eastern Counties Ry. Co.*, 6 Ha. 594.

(4) *Lucas v. James*, 7 Ha. 410, 424.

execution of a mere formal instrument, or otherwise relating to the mode of carrying the agreement into operation ;(1) nor of expressions which merely state a hope, expectation, desire, or other matter which is plainly not intended to be binding on either party.(2)

SEC. 65. *Third.* The acceptance must be made without unreasonable delay. If the offer itself states the time during which it will remain open, and is not previously withdrawn, the party to whom it is addressed has the entire period within which to make and communicate his acceptance. If the offer is wholly silent in respect to its duration, it continues, unless withdrawn, for a reasonable time, and must be accepted within the limits of that reasonable time. If the person to whom it is made accepts after an unreasonable delay—that is, after the reasonable time has elapsed—no contract is concluded thereby, even though the offer has not been expressly withdrawn, for it has been terminated by efflux of time, and there is nothing upon which the acceptance can operate.(3) What is a reasonable time, or

(1) *Gibbins v. North Eastern, etc., Asylum*, 11 Beav. 1 ; *Skinner v. McDouall*, 2 DeG. & Sm. 265 ; and see cases cited, *ante*, § 63.

(2) *Clive v. Beaumont*, 1 DeG. & Sm. 397, where the words, “we hope to give you possession at half-quarter day,” were held, in accordance with the rule stated in the text, not to affect the contract. *Johnson v. King*, 2 Bing. 270 ; *Fitzhugh v. Jones*, 6 Munf. 83, is an instructive case, as it will always be a somewhat nice question to discriminate between matter which is thus expressive of a hope or intent, and matter which is to be a term of the contract. A. wrote to B., the owner of lands, asking the latter’s terms per acre, and stating the order of payments he was willing to make. B. answered, stating the price, and accepting the proposed mode of payment, but required A. to procure the boundary lines to be ascertained. A. replied, accepting the terms, and consenting to establish the boundaries ; but his letter added a wish that B.’s agent would locate one of the lines which separated the land from certain adjacent proprietors, because he, A., was restrained from doing it himself by feelings of delicacy, on account of his personal relations with those proprietors. This latter expression of a wish did not amount to a new term, and the contract was held completed. In *Matteson v. Scofield*, 27 Wisc. 671, the vendor wrote to the vendee a letter, offering to sell land on certain terms, as to price and time, and mode of payment. The vendee answered by letter, accepting the offer, and proposing therein, but not as a condition of the acceptance, to transact the business through a bank at H., near the writer’s place of residence ; and the vendor replied to this, waiving his right to be paid at his own residence, and offering to come to H. and transact the business in person. Held, that a contract was concluded by the first letter of the vendor and the answer by the vendee, and that such answer contained no variation from the terms of the offer, but was an unconditional acceptance ; the suggestions on both sides, concerning the place of transacting the business, formed no part of the contract.

(3) *Meynell v. Surtees*, 1 Jur. (N. S.) 737, per Lord CRANWORTH : “When I offer anything to a person, what I mean is, I will do that if you choose to assent

unreasonable delay, must be determined by the circumstances of each case, depending, to a great extent, upon the nature of the subject-matter, the relations of the parties, and the course and usages of the trade or business. An offer to sell an estate will evidently remain open longer than an offer to sell merchandise in the market, or stocks in the exchange.(1)

SEC. 66. *The manner and form of the acceptance.*—The acceptance may be in writing, by parol, or by acts. The cases in which the contract must be embodied in a written memorandum, in order to satisfy the Statute of Frauds, will be considered in subsequent paragraphs.(2) In all species of agreements to which that statute does not apply, and to whose validity, therefore, a written memorandum is not essential, both the offer and the acceptance, or either of them, may, of course, be verbal.(3) A parol acceptance is, also, sometimes sufficient in cases falling within the Statute of Frauds. That statute requires a note or memorandum of the agreement signed by the party to be charged. When, therefore, the offer comes from the party to be

to it; meaning, although it is not so expressed, if you choose to assent to it in a reasonable time." *Williams v. Williams*, 17 Beav. 213. In 1827, A. wrote to B. that he had credited B.'s account with 220*l.*, in consideration of an agreement by B. to convey certain houses. The abstract of title was delivered, but B. did not accept in writing. Five years after, B. filed his bill against A. for a specific performance. A. had abandoned the matter in 1827, but B. all the time had the benefit of the credit. The bill was dismissed on the ground that an offer should be accepted and acted on within a reasonable time. *Beckwith v. Cheever*, 1 Fost. 41; *Peru v. Turner*, 1 Fairf. 185; *Wilson v. Clements*, 3 Mass. 1. The proposer, upon the receipt of an acceptance after such unreasonable delay, may, of course, treat it as valid, and as creating a concluded contract; but this would in reality be by renewing his offer and thus commencing the treaty *de novo*.

(1) In *Mactier v. Frith*, 6 Wend. 103, it was said that a willingness by the party offering to enter into the agreement, is presumed to continue for the time limited; and if that time be not limited by the offer, then until it is expressly revoked or countervailed by a contrary presumption. This latter clause is entirely misleading as the statement of a general rule, and even the first is liable to criticism.

(2) See the discussion of the Statute of Frauds, and the memorandum required by it, *post*, § 73, *et seq.*

(3) The parties may, if they prefer, adopt a written form in such cases; and if they do so the contract, when reduced to writing, cannot be varied nor in general even be proved by parol evidence; but the rule, which is one purely of expediency, does not apply to the *process of entering into the contract*, to the coming together and final *consensus* of the two minds upon the same points. Thus, in contracts for personal services, for manufacturing, etc., if effected by no provision of the statute, the offer might be directly made in a verbal negotiation, and the acceptance be stated and communicated in a letter; or the offer sent by letter and the acceptance given in a subsequent conversation; or both might be verbal and the contract concluded at the same interview.

charged, is in writing and signed by him or by his duly authorized agent, and contains all the terms of the proposed agreement, so that the acceptance need only be a simple assent without anything being left for it to determine or add by way of a further provision, such acceptance may be by parol, and constitute a completed contract, binding upon the proposer, in conformity with the statute.(1) The rule was settled under the chancery practice that in cases where the offer comes from the defendant, the filing of the bill in a suit to enforce a specific performance is *prima facie* evidence of an acceptance, subject, however, to proof by the defense that the offer had been withdrawn, or terminated by refusal, or by delay, or by any other means before the commencement of the suit.(2) Finally, the acceptance of an offer may be indicated by the acts of the party to whom it is made. In such a case, however, the acts should be regarded as *evidence* of the mental assent essential to the conclusion of a contract, rather than as *constituting* the assent itself.(3) In whatever mode the assent is signified, whether by writing, by words, or by conduct, it must be actually expressed in some overt manner, by some overt acts; a mere mental intention to accept an offer, however carefully formed, will not create a contract.(4)

(1) See *infra*, § 76, and cases there cited. It is, of course, essential that the written offer, signed by the proposer, should contain all the essential terms of the agreement in order that it should be a sufficient memorandum to satisfy the statute, and that, therefore, it should leave nothing to be decided or supplied by the acceptance; and the parol acceptance should be merely an assent to these terms. See *Warner v. Willington*, 3 Drew. 523, per KINDERSLEY, V. C.; *Smith v. Neale*, 2 C. B. (N. S.) 67, 88; *Coleman v. Upcot*, 5 Vin. Abr. 527, pl. 17; *Palmer v. Scott*, 1 R. & My. 391. In Minnesota, an oral acceptance of a written offer to sell land is insufficient under the statute. *Lanz v. McLaughlin*, 14 Minn. 72.

(2) *Boys v. Ayerst*, 6 Mad. 316. Whether the reformed system of procedure, which now prevails in so many of the states, as well as in England, has modified this rule, is a question which does not appear to have arisen. As the rule seems to have been based, not upon the form of the suit, but upon the mere fact of the plaintiff's bringing a suit to enforce the contract, and thus showing his acceptance of the defendant's offer by his conduct in the most complete manner, there is probably no reason why the rule itself should be changed.

(3) *Parker v. Serjeant*, Finch, 146; *Hodgson v. Hutchinson*, 5 Vin. Abr. 522, pl. 34. See, also, cases cited *post*, § 69. The principle here is identical with that which permits a marriage to be inferred from the conduct of the parties. A jury is always told that the conduct of the parties does not make them husband and wife, but that from their conduct it may infer that, at some prior time, they mutually consented to be husband and wife.

(4) *Frith v. Lawrence*, 1 Paige, 434. An intention by the person to whom an offer was directed to insert an acceptance thereof in a letter, but which he accidentally omitted to do, was held to have been nugatory.



SEC. 67. *The time when the contract becomes concluded.*—Any practical difficulty in respect to time can only arise when a contract results from antecedent treaty or negotiation, and the question then is: When does the character of the relation change from that of mere negotiation into that of obligation? In other words: When does the concluded contract begin? The acceptance of an offer creates a contract only from the time of the acceptance, and does not relate back to the time when the offer was made.(1) This principle is important in its application to acts and events intervening between the date of the offer and that of the acceptance; but it does not answer the question: When does the acceptance take effect? As soon as the acceptance is expressed by positive overt acts, and the assent of the two minds upon the same points is thus reached, the contract is concluded and obligatory, although the fact of such overt acts and of the assent which they represent is not, at the time, known to both of the parties.(2) This doctrine is most frequently applied in agreements negotiated by correspondence through the mail. The rule is well settled in England, and in most of the states in this country, that, in such cases, the contract is finally concluded at the time when a letter, containing the acceptance, properly addressed, is deposited in the post-office by the person to whom the offer was made. As the mail service is wholly under the control of the government, the party accepting has done all within his power to be done according to the ordinary course of business, and ought not to be prejudiced by any delay or failure of the post. The contract, therefore, is completed by and from the act of mailing the letter, even though it should never reach the person who made the offer. The posting, and not the receipt, of the letter fixes the inception of the agreement.(3) If the

(1) *Dickenson v. Dodds*, L. R. 2 Ch. D. 463.

(2) *Mactier v. Frith*, 6 Wend. 103.

(3) *Adams v. Lindsell*, 1 B. & A. 681; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Duncan v. Topham*, 8 C. B. 225; *Stocken v. Collin*, 7 M. & W. 515; *Potter v. Sanders*, 6 Ha. 1; *Mactier v. Frith*, 6 Wend. 103; *Vassar v. Camp*, 11 N. Y. 441; *Brisban v. Boyd*, 4 Paige, 17; *Clark v. Dales*, 20 Barb. 42; *Averill v. Hedge*, 12 Conn. 424; *Beckwith v. Cheever*, 1 Fost. 41 (N. H.); *Hamilton v. Lycoming Ins. Co.*, 5 Barr. 339 (Pa.); *Levy v. Cohen*, 4 Geo. 1; *Chiles v. Nelson*, 7 Dana, 281 (Ky.); *Falls v. Gaither*, 9 Port. 605 (Ala.). In Mass. this rule is rejected. *McCullough v. Eagle Ins. Co.*, 1 Pick. 278; *Thayer v. Middlesex Mut. Fire Ins. Co.*, 10 Pick. 326. It follows, as a necessary result from this rule, that if an offer is sent by mail, which is duly received, and before it is received, a withdrawal is dispatched in the same manner, but a letter accepting the offer is deposited in the post-office before such withdrawal arrives at its destination, the

negotiation is conducted by an agent for the proposer, his receipt of the acceptance, or the properly mailing it to him, as the case may be, completes the contract, although he may fail to communicate the fact to his principal.(1) If, however, the receiver of an offer sends his acceptance by a private messenger, it must actually reach the other party before any contract is concluded.(2)

SEC. 68. 2. *Promise to do something on demand.* — Another species of agreements, resulting directly from negotiation, embraces those cases in which a promise has been given by one party to do some specified act on demand, and the demand is made by the other party.(3) These contracts, however, when analyzed, appear to be particular instances of the general class just discussed, which are formed by an offer and an acceptance. The promise to do the act on demand is an offer, and the demand is an acceptance. The same rules, therefore, in regard to withdrawal, delay, mode and time of acceptance, apply alike to both, and need no further illustration.

SEC. 69. 3. Another group includes those contracts which are created by representations made by one party, and acts done by the other party upon the faith of such representations. A representation deliberately and intentionally made, for the purpose of influencing the conduct of another party, and then acted upon by him, is, in general, the foundation of a right.(4) In order that the right on one side and the duty on the other should be those of contract, the representation must be, in some sense, promissory—that is, must be of

contract is concluded, although the withdrawal reaches the party to whom it is sent before the acceptance can be conveyed by due course of mail to the person making the offer. See *The Palo Alto*, Davies, 344, which decides that in all engagements formed *inter absentes* by letters or messengers, an offer by one party is made, in law, at the time when it is received by the other. Before it is received it may be revoked. The revocation is also made when it is received, and not before. If the party to whom the offer is made accepts and acts on the offer, the engagement will be binding on both parties, though, before it is accepted, another letter or messenger may have been dispatched to revoke it.

(1) *Wright v. Bigg*, 15 Beav. 592.

(2) *Qu.* Where the acceptance is sent by an express company which does general public business.

(3) *Beatson v. Nicholson*, 6 Jur. 620.

(4) *Hammersley v. DeBiel*, 12 Cl. & Fin. 62, n. per Lord COTTENHAM: "A representation made by one party for the purpose of influencing the conduct of the other party, and acted upon by him, will, in general, be sufficient to entitle him to the assistance of this court for the purpose of realizing such representation." The case of representation, followed by acts, must be distinguished from that of an offer accepted by acts already mentioned. In the latter case there is an inten-

something in the future. Representations of facts, as existing or past, may be the occasions of right, but by the operation of other principles than that of contract.(1) Where an absolute unconditional representation of something to be done in the future is made by one person, in order to accomplish a particular purpose, and the person to whom it is made, relying upon it, does the acts by which the intended result is obtained, a contract is thereby concluded between the parties. The representation must be absolute in its terms and positive in its nature; something more than the mere expression of an intention depending upon contingencies, or of a wish, hope, or expectation; otherwise the obligation, if any, which arises from it will be only moral or honorary.(2) The cases involving this doctrine are, almost

tion by the offerer to create a contract; while the one making a representation may not intend to be bound, may intend to mislead.

(1) These principles are well settled and familiar. Whenever a representation is made concerning something as then existing, or as having existed, by a person who knows that such representation is untrue, or who does not know, or has no reasonable grounds to believe, it to be true, for the purpose of inducing another person to act, and that person, relying upon the statement, does some act which would be prejudicial to him in case the fact were otherwise than as represented, the party who made the representation is not permitted afterwards to deny the existence of the fact. The law, it is true, can only impose on him the remedial duty of paying a compensation in damages for the injury done by his false representation; but equity can compel him to make good his statement, and to conduct himself, in all respects, as though the fact did actually exist. The rights which thus arise from representations concerning existing or past facts and events, and the remedies, legal or equitable, for their enforcement are based either upon the principle of punishing and preventing fraud, or upon that of equitable estoppel, and are not referable to the doctrine of contract. One or two examples will suffice, for the subject does not properly belong to the present treatise. In *Bold v. Hutchinson*, 20 Beav. 250; 5 DeG. M. & G. 558, during the negotiation preceding a marriage, the father of the lady represented to her intended husband that she was entitled to 10,000*l.* on the death of her parents; she was in fact entitled to only half of this sum, and the father's estate was held liable for the deficiency. In *Neville v. Wilkinson*, 1 Bro. C. C. 543, under similar circumstances the father, during the arrangements preliminary to his daughter's marriage, asserted that a certain claim did not exist; and when he subsequently endeavored to recover the demand his proceedings were enjoined. The principle is, also, either referred to or applied in the following cases, both in law and at equity: *Money v. Jordan*, 2 DeG. M. & G. 332, per Lord CRANWORTH; *Ainslie v. Medlycott*, 9 Ves. 21, per Sir WILLIAM GRANT; *Jameison v. Stein*, 21 Beav. 5; *Gale v. Lindo*, 1 Vern. 475; *Scott v. Scott*, 1 Cox, 366; *Montefiori v. Montefiori*, 1 Wm. Black. 363, 364; *Gregg v. Wells*, 10 A. & E. 90; *Freeman v. Cook*, 2 Exch. 654; *Howard v. Hudson*, 2 El. & Bl. 1.

(2) Lord CRANWORTH said, in *Maunsell v. White*, 4 H. L. Cas. 1056: "There is no middle term, no *tertium quid*, between a representation so made to be effective

without exception, the results of negotiations respecting marriages, and the representations have been concerning the property to be settled upon or secured to one or the other of the intended spouses. As they belong to a social condition which does not exist in this country, it is sufficient to briefly mention them in the foot note.<sup>(1)</sup> There is a series of decisions, however, in which, from the special nature of the representations, it has been held that no contract arose. When, during the negotiation, the party expressly refuses to enter into a contract, and only pledges his honor, which he insists should be

for such a purpose and a contract; they are identical." *Randall v. Morgan*, 12 Ves. 67, was an example of a representation not absolute. A father, previous to his daughter's marriage, refused to make a settlement, but said he should allow her the interest of 2,000*l.*, and if she married, he *might bind* himself to do so, and to pay her the principal at his death. This was held not to be a contract. That the representation must be clear and absolute, see, also, *Maunsell v. White*, 1 J. & Lat. 567; *Loxley v. Heath*, 27 Beav. 523; 1 DeG. F. & J. 489; *Kay v. Crook*, 3 Sm. & Giff. 407; *Jameson v. Stein*, 21 Beav. 5; where the representation is contained in a lost document, parol evidence of its contents is admissible. 26 L. T. Rep. (N. S.) 381.

(1) *Moore v. Hart*, 1 Vern. 110, 201; 2 Cha. Rep. 284; *Wankford v. Fotherly*, 2 Vern. 322; 2 Freem. 201; *Halfpenny v. Ballet*, 2 Vern. 373; *Cookes v. Mascall*, 2 Vern. 34, 200; *Luders v. Anstey*, 4 Ves. 501; 5 Ves. 213; *Saunders v. Cramer*, 3 Dr. & W. 87. A marriage being in contemplation, the grandmother of the young lady wrote and signed a paper, which was directed to be shown, and was, in fact, shown, to the intended husband, wherein she stated her purpose to leave a certain sum to the grand-daughter to be secured by a bond. The marriage followed, and a binding contract was held to have been thereby concluded. *DeBiel v. Thompson*, 3 Beav. 469; 12 Cl. & Fin. 61, n.; *Hammersly v. DeBiel*, 12 Cl. & Fin. 45. A marriage negotiation: The father of the lady wrote that he "intended to leave his daughter a further sum of 10,000*l.* in his will to be settled on her and her children, the disposition of which, supposing she had no children, to be prescribed by the will of her father;" he retained the power to modify these arrangements. The proposal was accepted by the intended husband, and the marriage followed by the father's consent. It was held that the power of modification was terminated by the marriage and other acts, and that a binding contract was completed. See, also, *Montgomery v. Reilly*, 1 Bli. (N. S.) 364; 1 Dow, (N. S.) 62. Also, *Payne v. Mortimer*, 1 Giff. 118; 4 DeG. & Jo. 447; *Alt v. Alt.*, 4 Giff. 84; *Loffus v. Maw*, 3 Giff. 592. The contract may be enforced at the suit of the issue of the marriage. *Walford v. Gray*, 13 W. R. 335, 761; *Skidmore v. Bradford*, L. R. 8 Eq. 134. It should be borne in mind that this doctrine is entirely independent of the questions which may arise under the statute of frauds. The acts of parties accompanying or following a marriage may be essential to constitute the part performance of a prior parol agreement, and as such they will be considered in subsequent paragraphs. In such a case, however, the agreement is established outside of the acts, and they are relied upon to defeat the statute. By virtue of the doctrine stated in the text, the agreement itself is concluded and established by the acts:

accepted as sufficient, and it seems when the representation is of a *mere* intention, no obligation arises which can be enforced by the courts.(1)

(1) There can be no doubt when the party, in so many words, refuses to bind himself by a contract, and requires his pledge of honor to be taken instead of a legal obligation; but, in respect to the effect of a representation of intention, there has been a direct conflict of opinion among some of the ablest equity judges in England. The following cases are illustrations: *Lord Walpole v. Lord Orford*, 3 Ves. 402; *Maunsell v. White*, 1 J. & Lat. 539; 4 H. L. Cas. 1039. A young gentleman being suitor for the hand of a young lady who was yet a minor, her guardians objected to the marriage, unless a suitable settlement was made by him. He applied to an uncle of his, who, thereupon, wrote the following in answer: "My sentiments respecting you continue unalterable; however, I shall never settle any part of my property out of my power so long as I exist. My will has been made for some time, and I am confident that I shall never alter it to your disadvantage. I repeat, that my Tipperary estate will come to you at my death, unless some unforeseen occurrence should take place." He added that as he had never settled property on any one of his nephews, his making an exception now would create bad feeling among them; but he directed that this letter should be shown to the young lady's guardians. This was done, and the marriage followed. The uncle afterwards changed his mind, and failed to devise the estate to his nephew. In a suit to compel a specific performance, it was held by Lord ST. LEONARDS that there was no contract, and this decision was affirmed by the House of Lords. In *Money v. Jordan*, 15 Beav. 372; 2 DeG. M. & G. 318; 5 H. L. Cas. 185, the effect of a statement of intention was fully discussed, with great contrariety of opinion. A gentleman being about to marry, his creditor to whom he was indebted on a bond, stated that in case of his marriage she would never trouble him about the bond; that she had given it up, and would not enforce its payment; but when asked to actually surrender the bond she refused, insisting that her own word must be trusted, and that he might rely on her word. The gentleman was, thereupon, married, and a suit having been subsequently brought to recover the amount of the bond, he sought to restrain it by injunction. The relief was granted by the lower courts, but refused in the House of Lords by a majority. In the latter tribunal Lord ST. LEONARDS held that a representation of an intention might be binding, while Lord CRANWORTH, on the contrary, held that it was not. In *Moorehouse v. Colvin*, 15 Beav. 341, a father had made a will in which he gave 12,500*l.* to his daughter. She went to India under the care of a friend, to whom the father wrote that if she married with his approval, he would pay over to her husband 2,000*l.*; "nor will this be all; she is and shall be noticed in my will, but to what further amount I cannot precisely say, owing to the present reduced and reducing state of interest, which puts it out of my power to determine, at present, what I may have to dispose of." This letter was shown to the intended husband of the daughter, and the marriage took place. The father subsequently made another will, omitting the 12,500*l.* legacy to his daughter, and giving her only a contingent bequest in place of it. It was held that no contract was created by his letter and the acts done in reliance upon its statements. See, also, *Norton v. Wood*, 1 R. & Myl. 178; *Cross v. Sprigg*, 6 Ha. 552; *Viscountess Montacute v. Maxwell*, 1 P. Wms. 618; *Price v. Asheton*, 1 Y. & C. Ex. 441. See, also, *Loffus v. Maw*, 3 Giff. 592, 604; *Prole v. Soady*, 2 Giff. 1; *McAskie v. McCay*, 2 Irish Eq. 447. Such representation cannot be enforced, if

## SECTION IV.

*The written memorandum required by the statute of frauds.*

SECTION 70. The original statute of frauds, passed in the reign of Charles II, enacts that: "No action shall be brought \* \* \* to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him duly authorized." (1) I have collected and placed

the marriage did not take place by reason of any reliance on it—*i. e.*, if it was not acted on as a reason for the marriage. *Goldicutt v. Townsend*, 28 Beav. 445; *Jameson v. Stein*, 21 Beav. 5; and especially if it has been waived. *Caton v. Caton*, L. R. 2 H. L. 127, 142.

(1) 29 Car. II, ch. 3, § 4.

## ABSTRACT OF THE AMERICAN STATUTES.

The statutes of the following American states are identical, in legal effect, with the English statute, with sometimes a slight verbal alteration not affecting the meaning. Any substantial variation is plainly indicated. The other special forms of the statutes follow this abstract.

ARKANSAS (*Eng. Dig.*), ch. 73, § 1, excepting leases for not more than one year.

CONNECTICUT (*Gen. Stat.*, 1875), p. 441, § 40, excepting leases for not longer than one year.

DELAWARE (*Rev. Code*, 1852), p. 184, § 7.

FLORIDA (*Bush's Dig.* 1872), p. 157, ch. 29, § 1, excepting leases for not more than one year.

ILLINOIS (*Statutes by Gross*, 1874), vol. 3, p. 210, §§ 1 and 2, except that an agent must be "lawfully authorized in writing, signed by such party;" and the provision adds: "This section shall not apply to sales [of lands] upon execution, or by any officer or person, pursuant to a decree or order of any court of record in the state." "§ 3. The consideration of any such promise or agreement need not be set forth or expressed in the writing."

INDIANA (*Stat. by G. & H.*) vol. 1, p. 348, ch. 66, § 1, except leases for three years or less. § 2. The consideration need not be expressed. § 5. "Nothing contained in any statute of this state shall be construed to abridge the power of courts to compel the specific performance of agreements, in cases of part performance of such agreements." *Ib.* p. 612, § 5. "Contracts made by telegraph, between two or more persons, shall be considered as contracts in writing."

KANSAS (*Gen. Stat.* 1868), p. 505, § 6.

KENTUCKY (*R. S. by Stanton*), vol. 1, p. 264, ch. 22, § 1, enacts that no action shall be maintained, as in § 4, of English statute, in a number of specified cases,

in the foot note, an abstract of the corresponding provisions of the statutes of the various American states. These statutes are of two generic classes. In certain states, the legislation is substantially the

including some not in the English statute, and embracing: 5. Contracts upon consideration of marriage, except mutual promises to marry. 6. Contracts for sale, etc., of lands, except leases for one year. 7. Contracts not to be performed within one year, unless, etc., as in English § 4, but the memorandum must be "signed at the close thereof;" and the consideration need not be expressed in the writing.

MAINE (*R. S.* 1871), p. 786, ch. 111, § 1. The consideration need not be expressed.

MASSACHUSETTS (*Gen. Stat. ed. of 1873*), p. 527, ch. 105, § 1, same as § 4 of the English statute; § 2, consideration need not be expressed. *Ib.* p. 558, ch. 113, § 2, confers equity jurisdiction upon the supreme court in \* \* \* "Suits for the specific performance of written contracts, by and against either party to the contract and his heirs, devisees, executors, administrators, and assigns," \* \* \* "and shall have full equity jurisdiction, according to the usage and practice of courts of equity, in all other cases where there is not a plain, adequate, and complete remedy at law."

MISSOURI (*Gen. Stat. by Wagner, 1870*), vol. 1, p. 656, ch. 62, § 5, the same as § 4 of the English statute.

NEW JERSEY (*Nixon's Dig. 4th ed. 1868*), p. 358, § 14, the same as § 4 of the English statute.

NEW HAMPSHIRE (*Gen. Stat. 1867*), p. 407, ch. 201, § 12, is the same as the clause concerning lands in § 4 of the English statute, except the agent must be "by him thereto authorized in writing;" § 13 is the same as the remaining clauses of the English § 4.

OHIO (*R. S. by Swan & Critchfield, 1870*), vol. 1, p. 659, ch. 47, § 5, same as § 4 of the English statute.

PENNSYLVANIA (*Brightley's Purdon's Dig., 1872*), vol. 1, p. 724, § 4, includes only the clauses concerning, 1, promises of executor, etc., to answer for debt of deceased out of his own estate; and 2, promises to answer for the debt or default of another the same as in § 4 of the English statute. The *Pennsylvania* Legislature has not enacted any provision in relation to the other matters embraced in the general form of the statute of frauds.

TENNESSEE (*Stat. of 1871*), vol. 1, § 1758, is the same as § 4 of the English statute, except that it reads "unless the promise or agreement," etc., be in writing, and also leases for not more than one year are excepted.

TEXAS (*Pasch. Dig.*), p. 649, § 3875, the same as the English § 4, with the same variations as in *Tennessee*.

RHODE ISLAND (*Gen. Stat., 1872*), p. 443, ch. 193, § 8, same as English § 4.

VERMONT (*Gen. Stat., ed. of 1870*), p. 452, ch. 66, § 1, is same as the English § 4, except that it commences: "No action at law or in equity shall be," etc.; and in contracts relating to real estate an agent must be authorized in writing.

VIRGINIA (*Code, 1849*), ch. 143, § 1, includes all the clauses of the English § 4, together with some others, with the following change in the language: "unless the promise, contract, agreement, representation, assurance, or ratification," etc., be in writing, and adds that the consideration need not be expressed in the writing.

WEST VIRGINIA (*Code, 1868*), p. 535, ch. 98, § 1, same as the *Virginia* statute as last above described.

same in its language, and identical in its legal effect with the English enactment. In the others, a considerable change has been made in the language, a departure from the original type, which *might* have

NEW YORK, 2 (R. S.), p. 135, Tit. 1, "Of fraudulent conveyances and contracts relative to lands:"

"§ 8. Every contract for the leasing, for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration be in writing, and be subscribed by the party by whom the lease or sale is to be made.

"§ 9. Every instrument required to be subscribed by any party under the last preceding section, may be subscribed by the agent of such party lawfully authorized.

"§ 10. Nothing in this title contained shall be construed to abridge the powers of courts of equity to compel the specific performance of agreements in cases of part performance of such agreements."

*Ib.* p. 140, Tit. 2, "Of fraudulent conveyances and contracts relative to goods, chattels and things in action:

"§ 2. In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof [expressing the consideration], be in writing, and subscribed by the party to be charged therewith: 1. Every agreement that, by its terms, is not to be performed within one year from the making thereof. 2. Every special promise to answer for the debt, default, or miscarriage of another person. 3. Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry." (As amended by Laws of 1863, ch. 464, which struck out the words "expressing the consideration," inclosed in brackets, which words had previously been a part of the provision.)

ALABAMA (*Rev. Code*, 1867), p. 411, § 1862: "In the following cases every agreement is void unless such agreement, or some note or memorandum thereof, expressing the consideration be in writing and subscribed by the party to be charged therewith, or some other person thereunto lawfully authorized: 1. (Not to be performed within one year). (3. Debt, etc., of another). 4. (On consideration of marriage; all as in N. Y.) 6. "Every contract for the sale of lands, tenements or hereditaments, or of any interest therein, except leases for a term not longer than one year, *unless the purchase-money, or a portion thereof, be paid, and the purchaser be put in possession of the land by the seller.*"

CALIFORNIA (*Civil Code*, 1871), § 1624: "The following contracts, or some memorandum thereof, expressing the parties, their consent, and the object of the contract, must be in writing, subscribed by the party to be charged thereby, or by his agent for the purpose: 1. An agreement that, by its terms, cannot be fully performed within one year. 2. (Agreement upon consideration of marriage, as in N. Y.)"

§ 1741. "No agreement for the sale of real property, or of any estate therein, other than an estate for a term not exceeding one year, is valid unless a memorandum thereof, showing the parties, their consent, and the subject of the sale is made in writing, and subscribed by the party to be charged, or his agent *thereunto authorized in writing*, or unless the contract has been part performed by the party seeking to enforce it, and such part performance has been accepted by the other."

IOWA (*Rev. Code*, 1873). § 3663: "No evidence of contracts enumerated



led to a fundamental difference in the interpretation and legal effect. No such difference, however, appears to have arisen, except in reference to minor matters of detail, where the terms of the statutes are

in the next succeeding section is competent, unless it be in writing and signed by the party charged, or by his lawfully authorized agent." § 3664. "Such contracts embrace: 1. (Sales of personal property.) 2. (On consideration of marriage.) 3. (Guaranties, etc.) 4. "Those for the creation or transfer of any interest in lands, except leases for a term not exceeding one year." 5. (Not to be performed within a year.) § 3665. "\* \* \* Nor do the provisions of the fourth subdivision of the preceeding section apply where the purchase-money, or any part thereof, has been received by the vendor; or where the vendee, with the actual or implied consent of the vendor, has taken and held possession thereof under and by virtue of the contract; or where there is any other circumstance which, by the law heretofore in force, would have taken a case out of the statute of frauds." § 3666. "The above regulations, relating merely to the proof of contracts, do not prevent the enforcement of those which are not denied in the pleadings, except when the contract is to be enforced, or damages to be recovered, against some person other than him who made it."

MICHIGAN (*Comp. Laws*, 1871), vol. 2, p. 1455, ch. 166, § 8, is the same as N. Y. § 8, concerning leasing or selling lands, except that the words "expressing the consideration" are omitted, and the words "or by some person thereto by him lawfully authorized by writing" are added in place of the N. Y. § 9.

§ 9. The consideration need not be expressed in the writing. § 10. Is exactly the same as the N. Y. § 10 relating to specific performance.

MINNESOTA (*Stat. at Large*, 1873), vol. 1, p. 692, § 12, is exactly the same as the N. Y. § 8, concerning leasing or selling lands; § 13 is the same as the N. Y. § 10, concerning specific performance. *Ibid.*, p. 691, § 6: "No action shall be maintainable, in either of the following cases, upon any agreement, unless such agreement, or some note or memorandum thereof expressing the consideration is in writing, and subscribed by the party to be charged therewith," viz: 1, those not to be performed within a year; 2, guaranties, etc.; 3, those upon consideration of marriage except mutual promises to marry.

NEBRASKA (*Gen. Stat.*, 1873), p. 392, ch. 25, § 5, is the same as the N. Y. § 8, concerning leasing or selling lands, except that "signed" is used instead of "subscribed," and "expressing the consideration" is omitted; § 6 is the same as N. Y. § 10, concerning specific performance; § 8 is the same as the N. Y. § 2 of tit. 2, p. 140, except that "expressing the consideration" is omitted; § 24, in all these agreements the consideration need not be expressed; and § 25, every agreement to be subscribed by a party may be subscribed by his agent "authorized by writing."

NORTH CAROLINA (*Rev. Code*, 1855), p. 300, ch. 50, § 11. "All contracts to sell or convey any lands, tenements, or hereditaments, or any interest in or concerning them; and all leases or contracts for leasing land for the purpose of digging for gold or other minerals, or for the purpose of mining generally, shall be void and of no effect, unless such contract or lease, or some memorandum or note thereof, shall be put in writing, signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized, except leases and contracts for leases (other than those above named), not exceeding in duration the term of three years."

OREGON (*Gen. Laws*, by Deady, 1872), p. 264, ch. 8, § 775. "In the following

peremptory. From the language of the prohibition—"no action shall be brought"—it has long been the settled rule of construction, both in England and in those states which have adopted the same formula, that the statute does not go to the very substance of a contract, and render it a nullity, when not in writing; the statute relates exclusively to the procedure, and simply furnishes a *rule of evidence*, by which all agreements falling within its scope must be established. This interpretation lies at the foundation of the jurisdiction assumed by courts of equity to enforce verbal contracts in cases of a part performance. In many of the states, as it will be seen from the accompanying abstract, the legislatures have altered the language of this prohibition, and have declared the contracts specified by the statute *to be void* unless written. Except in one or two of the states, however, this change in the phraseology has produced no important change in the judicial interpretation of the provision. The various doctrines and rules, which had been settled by the English courts, have been generally adopted and enforced by the American tribunals, and especially the equitable principle with respect to the part performance of verbal contracts, has been followed without hesitation in all the states, with a very few exceptions, without any regard to any difference in the formal language employed by the legislatures.

SEC. 71. The controlling motive of the statute is one of expediency and convenience and this motive has always been kept in view by the ablest courts in their work of interpretation. As its primary object is to prevent mistakes, frauds, and perjuries, by substituting written for oral evidence in the most important classes of contracts, the courts of equity have established the principle, which they apply under vari-

cases the agreement is void unless the same, or some note or memorandum thereof expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing or secondary evidence of its contents in the cases prescribed by law," viz : 1, agreements not to be performed within one year; 2, promises to answer for the debt, etc., of another; 3, promises by an executor, etc.; 4, agreements upon the consideration of marriage other than a mutual promise to marry; 5, "an agreement for the leasing for a longer period than one year, or for the sale of real property, or of any interest therein; 6, an agreement concerning real property made by an agent of the party sought to be charged, unless the authority of the agent be in writing."

WISCONSIN (*Taylor's Stat.*, 1871), vol. 2, p. 1254, ch. 106, § 8, is the same as the N. Y. § 8, concerning lands; § 9, is identical with the N. Y. § 9, relative to the subscription by an agent; § 10, is identical with the N. Y. § 10, concerning the power of equity to enforce contracts in cases of part performance. *Ibid.*, p. 1255, ch. 107, § 2, is the same as the N. Y. § 2 of tit. 2, p. 140, except that the words "expressing the consideration" are retained.

ous circumstances, that it shall not be used as an instrument for the accomplishment of fraudulent purposes; designed to prevent fraud it shall not be permitted to work fraud. This principle lies at the basis of the doctrine concerning part performance, but is also enforced wherever it is necessary to secure equitable results.(1)

SEC. 72. As the agreement of the parties—their mental *consensus*—is always the substantial fact, and as the written memorandum is

(1) *Jervis v. Berridge*, L. R. 8 Ch. 351, is an example. The plaintiff had agreed to buy an estate from the L. Society, and to pay a deposit on signing the contract. Before signing plaintiff agreed with B. to assign it to him on certain terms. For B's convenience plaintiff gave him a memorandum assigning the contract to him in consideration of his paying the deposit to the L. Society, and agreeing to pay a certain sum to the plaintiff; the other terms of the verbal bargain between the plaintiff and B.—which were favorable to the plaintiff—were, at B's request, omitted from this written memorandum. The contract between the plaintiff and the L. Society was then signed; the counterpart executed by the society was delivered to B., and he paid the deposit. B. afterwards repudiated all the stipulations in plaintiff's favor which had not been inserted in the memorandum. Plaintiff then filed this bill against B. and the L. Society asking to have the memorandum between B. and himself canceled, and that the L. Society should convey the estate to himself on his payment of what was due. *Held*, by the Lords JJ. affirming the decision of V. C. MALINS, that B's demurrer should be overruled, since the *written memorandum was only ancillary to the verbal bargain between B. and the plaintiff, and any use of it by B. for a purpose inconsistent with that bargain was fraudulent and should not be permitted*; but as B. had repudiated that bargain plaintiff could fall back on his original rights under his agreement with the L. Society. See, also, *Haigh v. Kaye*, L. R. 7 Ch. 469. It is not within the scope of this work to discuss the question: What contracts are within the statute of frauds? But I add here a few recent cases in which this subject is considered. *Strech v. D'Evers*, 66 Ill. 77 (a verbal contract for the sale of a stock of goods with a verbal agreement to give a lease of the store for three years not enforced); *Cole v. Cole*, 41 Md. 301 (a verbal contract to give a mortgage; C. having purchased land, borrowed from A. the money with which to pay the price, verbally agreeing to give A. a mortgage on the land as security for the loan. C. then had the conveyance made to his own wife, who knew all the facts, and then refused to give the mortgage. *Held*, the contract with A. would be enforced by a sale of the land, if necessary.) *Wilson v. Chicago, etc.*, R. R., 41 Iowa, 443 (verbal agreement to convey a certain interest in land, held void); *Somerby v. Benton*, 118 Mass. 278 (a verbal agreement by an inventor to assign an interest in an expected patent right enforced); *Moote v. Scriven*, 33 Mich. 500 (a verbal agreement to advance money for the purchase of lands, and for the removal of incumbrances on them, which lands were to be conveyed to the promisee on his repayment of the advance, held void); *Levy v. Bush*, 45 N. Y. 589 (a verbal agreement by which one party promises to bid off certain land in his own name, and enter into a contract of purchase, and advance his own funds, the whole to be done for the joint benefit of himself and the other party, and the other party promises to reimburse one-half of the price, held void); *Henry v. Colby*, 3 Brews. (Pa.) 171 (a verbal contract for the sale of an interest in an oil well held within the statute).

ancillary to it, the evidence by which the fact is to be established, if the memorandum contains all the essential features of the contract, its external form is of little importance. The agreement itself, with all its technical phraseology and binding clauses, need not be spread out in the form of a legal instrument; the statute is satisfied, if all its constituent terms can be gathered from a writing or writings properly signed, and not from oral testimony resting in the memory of witnesses. It is not, of course, within the design of the present volume to enter into any general discussion of the statute of frauds. It will be enough to state and explain the rules which have a direct and practical application to the equitable remedy of specific performance. I shall consider the written memorandum required by the statute under three principal heads: 1. The mode of executing it. 2. The external form. 3. Its contents.

SEC. 73. *I. How the memorandum should be executed.*—The original statute, as copied in certain states, requires that the memorandum shall be “signed” by the “party” to be charged therewith, or by his agent thereunto duly authorized. The rule is settled, though with some conflict of opinion upon certain points, that wherever this language is used, the name, if intended to be a signature, and to authenticate the instrument, and not written for some other specific purpose, may be placed in any part of the memorandum, at the beginning, or in the body of it, as well as at the end.(1) The agreement may be written

(1) *Ogilvie v. Foljambe*, 3 Mer. 53, where a letter commencing: “Mr. Foljambe presents his compliments,” etc., was held to be a memorandum, duly signed. *Probert v. Parker*, 1 R. & Myl. 625, where a memorandum, written by A., began: “A. has agreed;” *Bleakley v. Smith*, 11 Sim. 150, the memorandum written by A. began: “B. agreed with A.,” etc.; *Barkworth v. Young*, 4 Drew, 1, an affidavit made by a party was held a sufficient memorandum; *Western v. Russell*, 3 V. & B. 187; *Morison v. Turnour*, 18 Ves. 175; *Penniman v. Hartshorn*, 13 Mass. 87; *Hawkins v. Chace*, 19 Pick. 502; *Yerby v. Grigsby*, 9 Leigh. 387; *McConnell v. Brillhart*, 17 Ill. 354; *Johnson v. Dodge*, 17 Ill. 433; *Higdon v. Thomas*, 1 Har. & Gill, 139; *Barry v. Coombe*, 1 Pet. 640. The English law, as to signing, is discussed and determined in the late case of *Caton v. Caton*, L. R. 2 H. L. 127. This case decided that, though it is not necessary that the signature of a party should, within the statute of frauds, which requires the memorandum to be “signed,” be placed in any particular part of a written instrument, it is necessary that it should be so introduced as to govern or authenticate every material and operative part of the instrument. Where, therefore, the name of the party against whom specific performance was sought to be enforced, appeared in different parts of the paper, but only in such a way that in every case it merely referred to the particular part where it was found, and that part was in the form of reference or description, and not of promise or undertaking; *Held*, the writing was not a memorandum sufficiently signed, under the statute.

on a paper which already contains the name, if the writing is intended to be a memorandum and the name to be a signature.(1) The delivery of the memorandum indicates an intention that the name written in it should have the effect of a signature.(2) There is some apparent conflict at least among the decisions on the question, how far the party must have intended the writing of his name to be a signing of the memorandum. In certain cases the memorandum was held to have been duly signed, although the name did not appear to have been written with such intent.(3) Other cases, involving similar facts, have been otherwise decided upon the evident inten-

The facts were briefly as follows: C., proposing to marry Mrs. H., who had property of her own, verbally agreed to settle her property on her in such way that she should have a certain income from it during his life, and the whole absolutely on his death. To carry out this agreement, he wrote out the paper in question, beginning thus: "In the event of a marriage between the undermentioned parties, the following conditions, as the basis of a marriage settlement, are mutually agreed upon." Then followed several clauses, each beginning in this form: "C. to do so and so; H. to have so and so;" but there was no subscription or signing by either party. The settlement was not made, and C. died afterwards, leaving a will, by which he bequeathed nearly all the property which he had received from his wife to his own relatives. His widow, as shown above, failed in her attempt to enforce the agreement against her husband's legatees. It will be difficult, in my opinion, to reconcile a considerable number of former cases with this decision. And, granting that the general principle laid down by the court is undoubtedly true, it is difficult to see its application to the writing in question. It would seem that, by a fair and reasonable construction, each clause in the form of "C. to do so and so with the property, and H. to have such and such rights over it," was something more than a mere "reference or description," and was plainly a "promise or undertaking," on the part of C. The decision of this case certainly worked the greatest injustice to the widow, who had plainly been the victim of a deliberate swindle throughout the whole transaction.

(1) *Wise v. Ray*, 3 Green (1a), 430; *McConnell v. Brillhart*, 17 Ill. 354; *Bluck v. Gompertz*, 7 Exch. 862, per POLLOCK, C. B.: "We think that words introduced into a paper signed by a party, or an alteration in it, may be authenticated by a signature already on the paper, if it is plain that they were meant to be so authenticated. The act of signing after the introduction of the words is not absolutely necessary."

(2) *Johnson v. Brook*, 31 Miss. 17.

(3) *Saunderson v. Jackson*, 2 B. & P. 239, where a party wrote his name at the beginning and left a place for his signature at the end, from which it was inferred "that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until it was further signed," and still the name was held to be a good signature; and see *Knight v. Crockford*, 1 Esp. 190. And where the party or person to be bound signs the writing as a witness, his signature has been held sufficient in *Welford v. Beazely*, 3 Atk. 503; *Coles v. Trecothick*, 9 Ves. 234, 251.

tion of the party that his name should not be a signature.(1). This conflict is, however, not real. In the first group of cases the writing showed an intention of the person to be bound; his name clearly appeared either at the beginning of the instrument, or at the bottom of it, and there was nothing else appearing on the face of the writing to which the name could be referred, except to its being the signature. In other words, the intention to sign the memorandum was legally inferred, and could not be defeated by any speculation as to the motives of the party. In the other group of cases the intention not to sign was clearly indicated by the form and terms of the instrument. Whenever the party's name is inserted in the body of the instrument, not as a signature, but for some other special purpose, the memorandum is not duly "signed" as required by the statute.(2) All occasion and possibility of these doubts and nice distinctions have been removed by wise alterations made in the language of many state statutes, which require the memorandum to be "subscribed" by the party, etc. Wherever this form of the provision is found, it is settled that the signature must be placed at the foot of the instrument, after all the operative part of the writing.(3)

SEC. 74. *The signature, how made.*—The signing must be effected by actually writing the name, or by writing or affixing something which is designed to take the place of and be equivalent to the name, as a mark made by one who cannot write, or initials.(4) The signature may be in pencil,(5) and even printed.(6) The effect of all the excep-

(1) *Gosbell v. Archer*, 2 A. & E. 500; *Hubert v. Treherne*, 3 Man. & Gr. 743.

(2) *Stokes v. McCre*, 1 Cox, 219; *Hawkins v. Holmes*, 1 P. Wms. 770; *Cowie v. Remfry*, 10 Jur. 789; *Cabot v. Haskins*, 3 Pick. 83.

(3) *Davis v. Shields*, 26 Wend. 341, reversing 24 Wend. 322; *Viele v. Osgood*, 8 Barb. 130; *James v. Patten*, 6 N. Y. 9, reversing 8 Barb. 344; *Coles v. Bowne*, 10 Paige, 526; *Champlin v. Parish*, 11 Paige, 405.

(4) *Selby v. Selby*, 3 Mer. 2. A letter began, "My dear Robert," and ended, "Do me the justice to believe me the most affectionate of mothers;" it was held not to be "signed." By *initials*, see *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446.

(5) *Lucas v. James*, 7 Ha. 410, 419.

(6) *Schneider v. Norris*, 2 M. & S. 286; *Saunderson v. Jackson*, 2 B. & P. 239; *Draper v. Pattina*, 2 Speers, 292; *Merritt v. Clason*, 12 Johns. 102; *McDowel v. Chambers*, 1 Strobb. Eq. 347; *Comm. v. Ray*, 3 Gray, 447; *Lerned v. Wannemache*, 9 Allen, 412, 417—Stamping; *Pitts v. Beckett*, 13 M. & W. 743; *Boardman v. Spooner*, 13 Allen, 353; *Schneider v. Norris*, 2 M. & S. 26. A telegraph message, if signed by the defendant, and full enough to show all the terms of the contract, is a sufficient memorandum; *Trevor v. Wood*, 36 N. Y. 307; *Hazard v. Day*, 14 Allen, 487; and to the same effect are the statutes in several states.

tional modes depends upon the intention. If a mark, or initials, or writing the name with a pencil, or printing it, is intended to be a signature, to take the place of a formal writing the name with ink, then the memorandum is "signed" to all intents and purposes.

SEC. 75. *By what parties to be signed.*—From the language of the provision that the agreement or memorandum thereof shall be signed by the party to be charged therewith, the rule is settled in England, and has been generally followed in this country, that, *so far as the statute of frauds affects the contract*, a signing by both parties is not necessary, but it is sufficient, if the agreement or memorandum is signed by the party against whom it is enforced, or attempted to be enforced. (1) This rule, which arose from a literal interpretation of

(1) *Hatton v. Grey*, 5 Vin. Abr. 525, pl. 4; 2 Cas. in Ch. 164; *Buckhouse v. Croshy*, 2 Eq. Cas. Abr. 32, pl. 44; *Coleman v. Upcott*, 5 Vin. Abr. 527, pl. 17; *Child v. Comber*, 3 Sw. 423, n.; *Backhouse v. Mohun*, 3 Sw. 434, n.; *Seton v. Slade*, 7 Ves. 265; *Lord Ormond v. Anderson*, 2 Ball & B. 363; *Fowle v. Freeman*, 9 Ves. 351; *Western v. Russell*, 3 V. & B. 192, per Sir Wm. Grant; *Martin v. Mitchell*, 2 J. & W. 413; *Flight v. Bolland*, 4 Russ. 298; *Egerton v. Matthews*, 6 East, 307; *Allen v. Bennett*, 3 Taunt. 169; *Laythoarp v. Bryant*, 2 Bing. (N. C.) 735; *Sweet v. Lee*, 3 Man. & Gr. 462 (ed. note); *Sutherland v. Briggs*, 1 Hare, 34; *Clason v. Bailey*, 14 Johns. 484; *McCrea v. Purmort*, 16 Wend. 460; *Woodard v. Aspinwall*, 3 Sandf. 272; *Shirley v. Shirley*, 7 Blackf. 452; *Rogers v. Saunders*, 16 Me. 92; *Ives v. Hazard*, 4 R. I. 14; *Anderson v. Harold*, 10 Ohio, 399; *Wright v. King*, Harring. Ch. 12. When the language was "the party to be charged," *Ballard v. Walker*, 3 Johns. Cas. 60; *Roget v. Merritt*, 2 Cai. 117; *Gale v. Nixon*, 6 Cow. 445; *Perkins v. Halsell*, 50 Ill. 217; *Estes v. Furlong*, 53 Ill. 302; *Barstow v. Gray*, 3 Greenl. 409; *Getchell v. Jewett*, 4 Greenl. 350; *Morin v. Martz*, 13 Minn. 191; *Douglass v. Spears*, 2 Nott & McC. 207; *Palmer v. Scott*, 1 Russ. & My. 391; *Parish v. Koons*, 1 Pars. Eq. Cas. (Pa.) 79; *Sams v. Fripp*, 10 Rich. Eq. 447; *Old Colony R. R. v. Evans*, 6 Gray, 25; *Barnard v. Lee*, 97 Mass. 92; *Young v. Paul*, 2 Stockt. Ch. 401; *Laning v. Cole*, 3 Green, Ch. 229; *Tripp v. Bishop*, 56 Penn. St. 423. Even when the clause reads, "by the parties to be charged," the same rule has been decided in New York, *Fenly v. Stewart*, 5 Sandf. 101; *Justice v. Lang*, 42 N. Y. 493. In this case the question was carefully examined and the prior authorities were exhaustively reviewed. See, however, a subsequent decision of the same case, involving the validity of the contract on a question outside the statute; 52 N. Y. 323; 39 Sup. Ct. (7 J. & S.) 283. Under the New York statute of frauds in a contract for sale, etc., of land the memorandum is required to be signed by the party selling, etc. Under this provision it is held sufficient if the memorandum is signed by the vendor, and not by the vendee; and it must be signed by the vendor. *Worrall v. Munn*, 5 N. Y. 229; *Calkins v. Falk*, 39 Barb. 620; *First Bapt. Ch. of Ithica v. Bigelow*, 16 Wend. 28; *Bleeker v. Franklin*, 2 E. D. Smith, 93. If not signed by the vendor, it cannot be enforced against the vendee. *McWhorter v. McMahan*, 10 Paige, 386; *Champlin v. Parish*, 11 Paige, 405; *De Beerski v. Paige*, 36 N. Y. 537; 47 Barb. 172; *Coles v. Bowne*, 10 Paige, 526; *Vielie v. Osgood*, 8 Barb. 130; *Townsend v. Hubbard*, 4 Hill, 351; *Davis v. Shields*, 26 Wend. 341. In the following cases a signa-

the statutory provision, has some appearance of interfering with the doctrine of mutuality as a feature of contracts outside the statute; and the rule itself has been severely criticised and even rejected by able courts in this country, for the reason that it practically allows a contract to be enforced by one party who could not in turn be held liable upon it at the suit of his adversary, and thus destroys the element of mutuality, which should belong to all agreements which are executory on both sides.(1) It may, perhaps, be sustained upon the following grounds: The statute of frauds does not reach the substance of contracts and render them invalid or valid; it simply furnishes a rule of evidence. Whenever, therefore, any agreement is enforced against a defendant who has signed it by a plaintiff who has not, it cannot be said that the agreement, so far as it purports to bind the plaintiff, is a nullity. In a suit against him the statute does no more than require a certain kind of proof, in case he avails himself of it as a defense. The defense, however, is wholly a personal one; and if he neglects to set it up, the agreement would be established against him notwithstanding the statute. For these reasons, it cannot be said that a memorandum signed by one party alone is so completely wanting in mutuality that no action upon it can be sustained.

SEC. 76. It has been tacitly assumed in the foregoing paragraph and in the rules which it states, that the contract was mutual in its language; that it purported to state the agreements of both the parties, and the only lack of mutuality which could be alleged arose from the fact that it was signed by one party only, so that an action could not be maintained upon it against the other non-signing party. The cases, however, have gone much farther than this. It is settled by the preponderance of authority, although there are some American

ture by the defendant in the suit, generally the vendor was held sufficient. *Ewins v. Gordon*, 49 N. H. 444 (a bond to convey); *Smith & Fleek's Appeal*, 69 Pa. St. 474; *Vassault v. Edwards*, 43 Cal. 458; *Rutenberg v. Main*, 47 Cal. 213. In *McIntire v. Bowden*, 61 Me. 153, specific performance of a contract was refused, which was not signed by all the persons named therein as parties. In *Slater v. Smith*, 117 Mass. 96, a written contract was signed by S. and P. wherein S. agreed to convey certain land to P. A suit for a specific performance by P. and his wife was sustained, although she was not a party to the writing.

(1) See *Boys v. Ayerst*, 6 Mad. 323, per Sir JOHN LEACH; *Lawrenson v. Butler*, 1 Sch. & Lef. 13, per Lord REDESDALE; *Davis v. Shields*, 26 Wend. 362, per VERPLANK, Senator; *Justice v. Lang*, 2 Robt. 333; *Marcus v. Barnard*, 4 Robt. 219; *Johnson v. Mulry*, 4 Robt. 401; *Lester v. Jewett*, 12 Barb. 502; *Boucher v. Van Buskirk*, 2 A. K. Marsh. 345; *Jones v. Noble*, 3 Bush. 694; *Geiger v. Green*, 4 Gill. 476; *Duval v. Meyers*, 2 Md. Ch. 401.



decisions which do not accept the doctrine,(3) that where one person makes a written offer to sell or to purchase land signed by himself alone, a verbal acceptance of this offer by the other person to whom it was addressed, will constitute a concluded contract binding upon the party who made and signed the written offer, and specifically enforceable against him, provided the writing is complete in itself, and no term of the contract must be supplied from the parol acceptance. It should be observed, however, that in New York and the other states where the statute of frauds requires the memorandum of a sale of land to be signed by the vendor, this doctrine would necessarily be confined to written offers of sale, and could not be extended to offers of purchase signed by the intended vendee alone.(2) The doctrine that

(1) See *Lanz v. McLaughlin*, 14 Minn. 72.

(2) *Warner v. Willington*, 3 Drewry, 523; *Smith v. Neale*, 2 C. B. (N. S.) 67; *Reuss v. Picksley*, L. R. 1 Exch. 342; *Sanborn v. Flagler*, 9 Allen, 474; *Old Colony R. R. v. Evans*, 6 Gray, 25; *Esmay v. Gorton*, 18 Ill. 483; *Farwell v. Lowther*, 18 Ill. 252. In *Warner v. Willington*, the court said: "The other ground of demurrer is this, that the memorandum was not a memorandum of agreement, but only an offer or proposal which the defendant retracted before it was accepted by the plaintiff. Now, there is a clear distinction between a memorandum of offer and a memorandum of agreement. In the case of an offer, no doubt the party signing it may at any time before acceptance retract; but if it be an agreement, though signed by one party alone, he cannot retract at his pleasure, but all he can do is to call upon the other party to sign or rescind the agreement. A memorandum of agreement supposes that the two parties have verbally made an actual contract with each other; and when the terms of such contract are reduced into writing and signed, that is sufficient to bind the party signing; but if the memorandum is of an offer only, that assumes that there has been no actual contract between the parties. Taking this as a memorandum, not of an agreement but of an offer, not then finally accepted, the question is whether there has been a sufficient acceptance by the plaintiff before the defendant retracted. What is alleged by the plaintiff as an acceptance, was his sending the draft lease. This raises another question: Can acceptance be by parol without writing? And it is singular that I cannot find any case in which it is determined that a parol acceptance of a written proposal is sufficient. But I think upon principle that a parol acceptance would be sufficient, because when one party has signed a written proposal, and the other expressly accepts it by parol—as if he says, in express terms, 'I accept the proposal'—that reduces it to a case of parol agreement come to between the parties, and a memorandum of the agreement signed by one, in which case it is clear that the signature of one party is sufficient to bind him, although the other has not signed." This reasoning, it will be seen, reduces the whole matter to a mere question as to the *time* of concluding the actual contract, of which the memorandum is the evidence. Ordinarily the parties make their parol agreement first, and then draw up a memorandum of it, which is sufficient if signed by the party against whom it is sought to be enforced. Here, however, the memorandum is drawn up and signed by one of the parties, in the first instance, and the parol agreement is afterwards made with reference to it. The case

the signature of the defendant is sufficient to constitute a valid memorandum, has not been accepted without some judicial protest. Even in states where the rule is now settled, there has been a strong opposition to it from eminent judges; in some states the decisions have been vacillating; while in a few, the doctrine seems to have been entirely rejected.(1)

of *Sanborn v. Flagler*, 9 Allen, 474, arose under the clause of the statute concerning a sale of goods, but the same principle must apply to the clause concerning the sale of land in its original and ordinary form. The memorandum signed by defendant was an offer as follows: "Will deliver to S. R. & Co. best refined iron, 50 tons, within 90 days, at 5 cents per lb. ; plates to be 10 to 16 inches wide, and 9 to 11 feet long. This offer good until 2 o'clock, Sept. 11, 1862." Plaintiffs verbally accepted the defendant's offer before the time named for its expiration, and sue on the contract for a non-delivery of the iron. The defense set up was that there had been no acceptance in writing, and that, therefore, no contract had been concluded. The defense was overruled. The court says, per BIGELOW, C. J. : "The note or memorandum on which the plaintiffs rely to maintain their action, contains all the requisites essential to constitute a binding contract within the statute of frauds. It is not denied by the defendant that a verbal acceptance of a written offer to sell merchandise is sufficient to constitute a complete and obligatory agreement on which to charge the person by whom it is signed. In such a case, if the memorandum is otherwise sufficient, when it is assented to by him to whom the proposal has been made the contract is consummated by the meeting of the minds of the two parties, and the evidence necessary to render it valid and capable of enforcement, is supplied by the signature of the party sought to be charged to the offer to sell. Indeed, the rule being well settled that the signature of the defendant only is necessary to make a binding contract within the provisions of the statute, it necessarily follows that an offer to sell, and an express agreement to sell, stand on the same footing; inasmuch as the latter, until it is accepted by the other party, is in effect nothing more than a proposition to sell on the terms indicated. The acceptance of the contract by the party seeking to enforce it, may always be proved by evidence *aliunde*." In *Old Colony R. R. v. Evans*, 6 Gray, 25, the same doctrine was applied to a contract for the purchase of land. The defendant offered that if the company would do certain specified acts, then he would purchase from it a farm called the "Mt. Hope farm." The company verbally accepted his offer, and did the acts which it required. On his refusal to complete the purchase, the company sued him on the agreement to compel payment of the price and acceptance of the deed. The court held that the plaintiff's acceptance of the offer, although verbal, and its performance of the conditions specified in it, constituted a contract binding on the defendant, which would be enforced, although he could not have the same remedy against the company. See, also, *Fishmongers' Co. v. Robertson*, 5 M. & G. 131.

(1) Among the cases in which the doctrine has been questioned or disapproved by individual judges, are *Boys v. Ayerst*, 6 Mad. 323, per Sir JOHN LEACH; *Lawrenson v. Butler*, 1 Sch. & Lef. 13, per Lord REDESDALE; *Benedict v. Lynch*, 1 Johns. Ch. 370, and *Clason v. Bailey*, 14 Johns. 484, 490, per Chan. KENT; *Davis v. Shields*, 26 Wend. 362, per VERPLANK, Senator. In Pennsylvania the decisions have been conflicting; *Lowry v. Mehaffy*, 10 Watts, 387, approved the rule as stated in the text; but in *Wilson v. Clark*, 1 W. & S. 554, C. J. GIBSON vigorously

SEC. 77. *How to be made by an agent.*—The statute provides that the memorandum shall be signed by the party himself, or by “some other person thereunto by him lawfully authorized.” Whenever reliance is placed upon the latter clause, the authority of the person who has assumed to act as agent, not merely to enter into a negotiation, or to receive proposals, but to execute a completed and binding contract for his principal, must be established as in any other case of agency.(1)

attacked it, and his opinion was followed by KING, J., in *Parrish v. Koons*, 1 Pars. Eq. Cas. 79, 81. At a later day, the doctrine was again approved by the Supreme Court in *McFarson's Appeal*, 1 Jones, 503, and *Simpson v. Breckenridge*, 8 Casey, 287, and was finally established, after a thorough discussion and review of the cases, in *Tripp v. Bishop*, 6 P. F. Smith, 424.

(1) *Blore v. Sutton*, 3 Mer. 237; *Frith v. Greenwood*, 1 Jur. (N. S.) 806; *Howard v. Braithwaite*, 1 V. & B. 202; *Ridgway v. Wharton*, 3 DeG. M. & G. 677; 6 H. L. Cas. 238. In this case the evidence of authority was discussed in the House of Lords in an exhaustive and very instructive manner by Ld. Chan. CRANWORTH, pp. 259–263, Lord ST. LEONARDS, pp. 274–284, and Lord WENSLEYDALE, pp. 296–304. From Lord WENSLEYDALE's judgment I take the following extracts (p. 296): “Now this proposition is to be distinctly made out by the plaintiff. He must satisfy the court, not so as not to admit of a reasonable doubt, but upon the balance of the evidence that *Crawter* (the alleged agent) was the defendant's agent. He must prove that as a matter of fact, and if he leaves that question at the end of the case, in even scales, the plaintiff cannot prevail.” \* \* \* (p. 296.) “Wherever a man purports to make a contract with the agent of another, in order to bind that other, the agent must have authority from him. It matters not whether it is authority previous or subsequent. If a man, professing to act for another, makes a contract for him, and authority is afterwards given by that other, the authority given subsequently is equal to authority given before, according to the old maxim, *omnis ratihabitio retrotrahitur et mandato aequiparatur*. If a contract is made by an agent, whether by authority before given, or afterwards by ratifying the contract, it equally binds the principal.” \* \* \* (p. 297.) “Then there is a third mode by which the defendant may be bound. Though he has given no authority to Mr. C., he may have represented to the party with whom the contract has been made, that he has given such authority; and if he has done so, or has done what is equivalent to treating the person who has made the contract as his agent, he cannot afterwards recede from the contract, but he is bound by it, and is estopped by that representation.” *Chinnock v. Marchioness of Ely*, 4 DeG. J. & S. 638, illustrates a restricted authority. The Marchioness determined to sell certain property subject to several special conditions and stipulations, and instructed her solicitors, L. & M., to sell it for 10,000*l.*, in that manner only. The solicitors thereupon sent the following to one Smith, a house agent: “We have received instructions from the M. of Ely to employ you in selling her house by private contract,” etc., stating the price, the time of giving possession. On the day when this letter was delivered, one of the solicitors called on Smith and informed him, “that he (Smith) was not to enter into any contract for the sale of the house, since it was to be sold subject to certain conditions, being the same under which the owner had purchased.” *Held*, by Ld. Chan. WESTBURY, (p. 641): “That Smith had no authority to make any final agreement. His office

The doctrines relative to the nature and extent of authority, whether general or special, express or implied, are as constantly appealed to in administering the equitable remedy of specific performance as in granting the legal remedy of damages; but this discussion is not within the limits nor the design of the present work. I merely add, that where the delegation of authority is express and special, and the other party dealing with the agent cannot fall back upon any larger implied powers, the limitations may relate to the manner and form of executing the contract, as well as to the substantial terms which it shall contain; and in such a case the agent must keep within the restricted authority conferred upon him and strictly pursue the method prescribed by his instructions.(1)

SEC. 78. *How authority may be conferred.*—Authority may, of course, be given by express prior delegation. It may, also, be implied from the acts, conduct and relations of the parties, and from the nature, course, and usages of the agent's own business, or from the manner and extent in which he has been held out to the world as possessing authority from the principal over matters of the same general character.(2) Also, though the principal has actually given no authority, he may have represented to the party with whom the contract has been made, that he has given such authority; and if he has

was to exhibit the terms on which the defendant proposed to sell, to receive any offers or proposals, and to transmit them to the solicitor and agent of the defendant." *Held*, therefore, that there could be no contract concluded by a purchaser with Smith. In *Hamer v. Sharp*, L. R. 19 Eq. 108, an owner gave a real estate agent a written request to find a purchaser of a property at a certain price, and to advertise. *Held*, such agent had no authority to enter into an "open" contract for sale—*i. e.*, an absolute contract to sell for a specified price without any conditions or stipulations as to the, etc., and *semble*, no authority to enter into any contract for sale. See, also, as to the establishing the agent's authority, *Roby v. Cossitt*, 78 Ill. 638, in a suit to enforce contract of vendor, made by his agent, the authority of such agent must be alleged or shown by some averment; *Taylor v. Merrill*, 55 Ill. 52; *Fitch v. Boyd*, 55 Ill. 307 (same point); *Beckett v. White*, 26 Ohio St. 405; *Bissell v. Terry*, 69 Ill. 184.

(1) *Frazer v. McPherson*, 3 DeSsau. 393; *Mackay v. Moore*, Dudley, 94. If an agent contracts to sell property in a manner different from that authorized, the contract will not be enforced—*e. g.*, agent authorized to sell at auction sold at private sale, although for a higher price than the limit, *Daniel v. Adams*, Amb. 495; and see, *Helsham v. Langley*, 1 Y. & C. C. C. 175; *White v. Cudden*, 8 Cl. & Fin. 766; *Manser v. Back*, 6 Har. 443; *Sneesby v. Thorne*, 7 DeG. M. & G. 399.

(2) *Sharp v. Milligan*, 22 Beav. 606. If a person employs a real estate agent to sell his house, and gives no special instructions, the extent of the agent's authority and his power to make a contract of sale might be implied from his customary methods of transacting business as generally known to the public.

done so, or has done what is equivalent to treating the person who has made the contract as his agent, he cannot afterwards recede from the contract, but he is bound by it, and is estopped by that representation.(1)

SEC. 79. The mode of conferring authority is not prescribed by the statute of frauds, and must, therefore, depend upon the general doctrines of agency, except when regulated by other statutes. If a conveyance or any other act is required by law to be by deed, the authority of the agent to execute it must be conferred by deed. Contracts, however, relating to real estate, as for sale, letting, and the like, need not be under seal, and the rule is settled that the authority of an agent to enter into such agreements may be given by parol, and may, therefore, be implied from acts and circumstances;(2) unless,

(1) Per Lord WENSLYDALE, in *Ridgway v. Wharton*, 6 H. L. Cas. 238, 297.

(2) *Waller v. Hendon*, 5 Vin. Abr. 524, pl. 45; *Coles v. Trecothick*, 9 Ves. 234, 250; *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Dyas v. Cruise*, 2 Jon. & Lat. 460; *Mortlock v. Buller*, 10 Ves. 311; *Yerby v. Grigsby*, 9 Leigh, 387; *Irvine v. Thompson*, 4 Bibb. 295; *Shaw v. Nudd*, 8 Pick. 9; *Turnbull v. Trout*, 1 Hall, 336; *Mortimer v. Cornwell*, 1 Hoff. Ch. 351; *Johnson v. Dodge*, 17 Ill. 433; *Lawrence v. Taylor*, 5 Hill, 107; *More v. Smedburgh*, 8 Paige, 600 (contract for sale of land by a firm signed by one partner for himself and copartner, whether good or not, *qu.*); *McWhorter v. McMahan*, 10 Paige. 386, per WALWORTH, Ch.: "It is only necessary that such agent be lawfully authorized to execute the contract; an authority in writing for that purpose is not required by the statute of frauds. An authority to convey lands is required by the statute to be in writing, but clearly not an authority to contract to convey. The whole subject was thoroughly discussed in *Warrall v. Dunn*, 5 N. Y. (1 Seld.) 229, which *held*, that when an agent, authorized by parol to make a contract, executes an agreement *under seal*, it is binding on the principal as a simple contract; that a contract for the sale of land need not be sealed, but merely in writing, and that the agent's authority to execute it may be conferred by parol." Per PAIGE, J. (p 239): "It is a maxim of the common law that an authority to execute a deed or instrument under seal, must be conferred by an instrument of equal dignity and solemnity—that is, by one under seal. This rule is purely technical. A disposition has been manifested by most of the American courts to relax its strictness, especially in its application to partnership and commercial transactions. I think the doctrine as it now exists may be stated as follows, viz: If a conveyance or any act is required to be by deed the authority of the attorney or agent to execute it must be conferred by deed; but if the instrument or act would be effectual without a seal, the addition of a seal will not render an authority under seal necessary; and if executed under a parol authority or subsequently ratified or adopted by parol, the instrument or act will be valid and binding on the principal. It is said that the rule, as thus relaxed, is confined in its application to transactions between partners. But it seems to me that a distinction between partners and other persons in the application of the rule, as relaxed and qualified by recent decisions, stands upon no solid foundation of reason or principle." *Heard v. Pilley*, L. R. 4 Ch. 548. Bill by a vendee for the specific performance alleged that the con-

as is the case in certain states, the authority to make such contracts is required by statute to be in writing. In England there is an exception in reference to corporations. The common-law doctrine that corporations can only contract by means of their seal is not entirely abandoned, and the power of such bodies and of joint-stock companies is limited, and their mode of action is prescribed by statutes.<sup>(1)</sup> No such exception exists in the United States, and the agents of corporations may here be appointed by parol, and their authority may be implied to the same extent as the agents of private persons.<sup>(2)</sup> The authority of an agent to enter into a contract which shall be binding under the statute of frauds, may also be conferred by ratification whether the principal be a private individual or a corporation. Ratification, which, of course, assumes that an authority did not exist at the time of doing the act in question, relates back and supplies the place of a prior mandate—*mandato aequiparatur*.<sup>(3)</sup>

tract was made by A., one of the defendants, as agent for the plaintiff, but that the agent claimed the benefit of the contract himself. It appeared by the allegations of the bill that the agent was appointed by parol. Both defendants, A., the agent, and B., the vendor, demurred. Their demur was overruled; the court holding, among other things, that a contract for the purchase of land made by an agent of the vendee, who was only appointed by parol, may be specifically enforced. See, also, *Fisher v. Bowser*, 41 Tex. 222; *Rutenburg v. Mein*, 47 Cal. 213.

(1) As to agents of joint-stock companies, see 19 and 20 Vict. Ch. 47, § 41; also 8 and 9 Vict. Ch. 16.

(2) *Angel & Ames on Corp.*, §§ 282, 283, 284.

(3) *Ridgway v. Wharton*, 6 Ho. L. Cas. 238, 296, per Lord WENSLEYDALE; *Maclean v. Dunn*, 4 Bing. 722; *Bigg v. Strong*, W. R. (1857-8) 173, *Clark v. Riemsdyck*, 9 Cranch, 153; *Barbour v. Craig*, 6 Litt. 213; *Benedict v. Smith*, 10 Paige, 126; *Wilson v. West Hartlepool R'y Co.*, 2 DeG. J. & S. 475, is an instructive case. A subordinate officer (traffic manager) of a railway company, without any direct authority, agreed to sell to plaintiff a piece of land of the company, at a certain price per acre. One of the provisions of the contract was that the company should lay down a branch track to the land. The company's surveyor measured the land, its engineer laid down the branch track, the plaintiff was let into possession, and his machinery was brought to the land on the company's wagon. Afterwards the company refused to complete. *Held*, by the M. R. and the L. L. J., that the contract had been ratified by the company, and was binding, and a specific performance decreed. L. J. TURNER, after reaching the conclusion that Chester, the officer who made the contract, had no prior authority, proceeds (p. 491): "But it was said, on the part of the plaintiff, that the directors ratified this contract, and I think they must be held to have done so (recapitulating the facts). These acts were in conformity with the contract, and they amount, I think, to a representation by the defendants to the plaintiff that the contract was a subsisting and valid contract. \* \* \* The purchaser was so far treated as a purchaser that he could no longer be treated as a trespasser, as he must have been,

SEC. 80. When sales are made at auction by a public auctioneer duly authorized, he is, from the necessities of the case and the nature of the business, an agent both for the vendor who directly employs him, and for the purchaser whose bid is successful; and an entry in his book, or account of sales, containing the terms of the contract and signed by himself, is a memorandum duly executed in conformity with the statute;(1) and this equally applies to auction sales of real and of personal property.(2) It seems that a contract signed by an auctioneer on behalf of an undisclosed vendor is valid and binding upon the principal.(3) When a private sale, however, is made at

if there was no valid or binding contract." \* \* \* (Page 493): "It was said, on the part of the defendants, that the company could not sell otherwise than by an agent appointed under their common seal; but the question here is upon a sale by the directors, and it was not disputed that they had authority to sell." (Page 495): "There remains, then, the question whether this contract ought to be held binding on the company, having regard to the statutory provisions as to contracts by companies. In this point of view it is material, in the first place, to consider how the question would have stood before the passing of these statutory provisions. It is not disputed that the directors had power, on behalf of the company, to sell the land in question; and, having the power, it must, as it seems to me, have been competent to them to ratify a contract made by the manager of the company for the sale of it. They in fact ratified this contract. It became in effect their contract. I see no ground on which, before the passing the statutory provisions, the court could have refused specific performance of the contract, much less do I think a specific performance could have been refused when the ratification had been followed by possession being given under the contract. The question, then, is reduced to this, whether the statutory provisions have altered this state of the case. The provisions are contained in 8 and 9 Vict., Ch. 16, § 97. The legislature has, in this section, pointed out modes in which the powers of directors to contract may lawfully be exercised, and has enacted that all contracts made according to these provisions shall be binding and effectual; but it has not said that contracts made in other modes shall not be binding and effectual, where there is power so to make them; and certainly it has not said that any equity which may have existed in this court before these provisions were introduced, shall no longer exist. The act is affirmative, and affirmative acts are not generally to be construed so as to take away pre-existing rights or remedies." This latter part of the opinion and what follows properly belongs to the doctrine of *ultra vires*. See, also, on the doctrine of ratification and acquiescence by a corporation, *Crook v. Corporation of Seaford*, L. R. 6 Ch. 551; *ib.*, 10 Eq. 678.

(1) *Kemeys v. Proctor*, 3 V. & B. 57; 1 J. & W. 350; *Buckmaster v. Harrop*, 7 Ves. 341; 13 Ves. 456; *Lord Glengal v. Barnard*, 1 Keen, 788; *Gosbell v. Archer*, 2 A. & E. 500; *Kenworthy v. Schofield*, 2 B. & C. 945; *Emmerson v. Heelis*, 2 Taunt. 38; *White v. Proctor*, 4 Taunt. 209; *Smith v. Jones*, 7 Leigh, 165; *Episcopal Church of Macon v. Wiley*, 2 Hill Ch. 584; *McComb v. Wright*, 4 Johns. Ch. 659; *Bleeker v. Franklin*, 2 E. D. Smith, 93.

(2) *Bailey v. Leroy*, 2 Edw. Ch. 514; *Anderson v. Chick*, 1 Bailey Ch. 118.

(3) *Beer v. London and Paris Hotel Co.*, L. R. 20 Eq. 412, 426, per V. C. MALINS. And in *Walsh v. Barton*, 24 Ohio St. 28, where land was sold at auction the vendor

auction rooms, the auctioneer is not, by virtue of his business, an agent for the purchaser.(1) From alike necessity of the business the clerk of an auctioneer *at the sale* is an agent of the purchaser to make the entry in the book or account of sales, and thus complete a memorandum of the contract.(2) The clerks of other agents are not themselves agents, for the authority is personal and fiduciary and cannot be delegated; but such clerks may, of course, be made agents either by express delegation of power from the principals, or by implication from their conduct.(3) These rules concerning auctioneers have been incorporated into the statute of frauds of certain states. A commissioner, referee, or master appointed by the court to make a public judicial sale, is, like an auctioneer, the agent for both parties, and may bind them by his memorandum of the sale.(4) An attorney employed in a negotiation concerning a proposed marriage, who reduced into a written form the verbal agreement made by the parties at an interview, was held not to be their agent, so as to make his insertion of their names in the memorandum a sufficient signing to comply with the statute.(5)

SEC. 81. 2. *External form of the memorandum.*—When the agreement, as is most frequently the case, is set forth in one single memorandum, signed or subscribed in the ordinary manner, no questions can arise as to its external form, and nothing, therefore, need be said concerning it. But the various parts of a contract may be distributed through several different writings—very often letters, which if they contain all the essential terms and the necessary signatures, and are sufficiently connected by references from one to the other, will, taken together, constitute the memorandum required by the statute. Con-

not being disclosed, the memorandum made by the auctioneer who was agent of the vendor, and which was signed by the auctioneer and by the purchaser, without the name of the vendor appearing, was held to be sufficient to satisfy the statute of frauds. Compare with these two cases, the case of *Potter v. Duffield*, L. R. 18 Eq. 4, the facts of which are given in note to § 88. The distinction appears to be that in *Potter v. Duffield*, the contract did not purport to be made by the auctioneer *as a contracting party*, but simply as agent for an undisclosed principal who was called “the vendor,” so there was in fact no party selling appearing to be bound by the contract. In the other two cases the auctioneer was the contracting party binding himself, and the contract was, therefore, complete on its face with vendor and vendee.

(1) *Mews v. Carr*, 26 L. J. Ex. 39.

(2) *Bird v. Boulter*, 4 B. & Ad. 443; *Smith v. Jones*, 7 Leigh, 165.

(3) *Coles v. Trecothick*, 9 Ves. 234.

(4) *Jenkins v. Hogg*, 2 Const. Rep. 821; *Gordon v. Sims*, 2 McCord Ch. 151.

(5) *Lord Glengal v. Barnard*, 1 Keen, 769; *De Biel v. Thompson*, 3 Beav. 469.



tracts of this form, contained in letters or other separate papers, may be conveniently arranged in three classes, all which, however, are governed by the same rules and doctrines: 1, where all the terms of the agreement are contained in a writing which is unsigned, and letters or other papers are used to adopt that writing and to supply the signatures; 2, when a part of the terms only are found in the unsigned writing, and the letters adopting them supply the others as well as the signatures; 3, where the letters themselves constitute the contract without reference to any other distinct writing. There is no distinction in principle between these classes, which are given simply for a clearer arrangement of the decided cases. The rules applicable to the first apply to both the others.

SEC. 82. 1. Where the terms of an agreement are all stated in one writing which is unsigned, and other writings, or a writing—such as letters, or a single letter—contain the signatures, and so refer on their face to the first paper as to show an intention of adopting its contents, the whole will constitute a sufficient memorandum and a binding contract. There must be a reference, and a reference to terms in writing, for no essential part of the agreement can be supplied by parol. Parol evidence, however, is admissible to ascertain and identify the paper to which reference is thus made.<sup>(1)</sup> The object

(1) *Tawney v. Crowther*, 3 Brown C. C. 318, per Ld. Chan. THURLOW. “And first as to the statute of frauds, it is an easy question taken by itself. A good deal of ingenious argument has been made use of to prove that the letter is insufficient to take it out of the statute of frauds. If the letter contains the terms of the agreement, *or if it refers to another paper which contains the terms*, that is sufficient, for I am of opinion that if a letter refers so clearly to an agreement as to show what was meant by the parties, when the existence of the paper is proved by parol, that will take the case out of the statute.” Although the decision of Lord THURLOW in this case, on the whole facts, has been criticised by Lord REDESDALE in *Clinan v. Cooke*, 1 Sch. & Lef. 22, 33, and by Lord CRANWORTH in *Ridgway v. Wharton*, 6 H. L. Cas. 238, 267, 263, yet this particular doctrine, as laid down by him, has never been questioned; indeed, Lord CRANWORTH expressly approves and adopts it in the last-named case, at p. 266. In *Ridgway v. Wharton*, 6 H. L. Cas. 238, Lord CRANWORTH said (p. 257): “If there is an agreement to do something not expressed on the face of the agreement signed, that something which is to be done being included in some other writing, parol evidence may be admitted to show what that writing is, so that the two, taken together, may constitute a binding agreement within the statute of frauds.” \* \* \* (p. 238.) “If authority had been given by defendant to C. (his agent) to agree to grant a lease, and if C. entered into an agreement to grant a lease in the terms of the written instructions which he gave to G., the solicitor, parol evidence showing what those instructions were, and that they were written instructions, would be sufficient to take the case out of the statute of frauds.” All the law lords concurred in this doctrine. *Allen v. Bennet*, 3 Taunt. 169, is a leading case, although decided upon

of such evidence is not to prove the terms themselves, and thus make out the substantial fact of the contract without writing, but simply to explain the reference by ascertaining to what it applies, and by identifying the writing what is thus referred to and adopted. Without such a reference in the face of the paper or letters, parol evidence is inadmissible to connect them with another writing, and to bring it in as a constituent part of the agreement.(1) It has been held that a

another clause of the statute. A traveler for a London merchant made an agreement for the sale of goods to a country shop-keeper, and entered the terms of the sale, without signature, in the latter's books; the London merchant afterwards wrote a letter to his agent referring to, and recognizing the terms thus entered, and the two, the entry and the letter, were held to be a memorandum sufficiently signed by the seller to satisfy the statute. See, also, *Coles v. Trecothick*, 9 Ves. 250, per Lord Eldon; *Clinan v. Cooke*, 1 Sch. & Lef. 33; *Gaston v. Frankum*, 2 DeG. & Sm. 561; *Powell v. Dillon*, 2 Ball & B. 416; *Dobell v. Hutchinson*, 3 A. & E. 355; *Saunderson v. Jackson*, 2 B. & P. 233; *Jackson v. Lowe*, 1 Bing. 9; *Wood v. Scarth*, 2 K. & J. 33; *Western v. Russell*, 3 V. & B. 187; *Parkhurst v. Van Cortland*, 1 Johns. Ch. 273; *Forster v. Hale*, 3 Sumn. 696; *Ide v. Stanton*, 15 Verm. 685; *Farwell v. Lowther*, 18 Ill. 252; *Blair v. Snodgrass*, 1 Sneed, 1; *Tallman v. Franklin*, 14 N. Y. 584; *Bauman v. James*, L. R. 3 Ch. 508. A tenant applied to the landlord's solicitor for a renewal of the lease. The solicitor sent him a report of a surveyor, which recommended granting a lease for fourteen years, at a certain rent, if tenant made certain repairs. Tenant wrote back assenting to the rent and repairs, but asking for twenty-one years. A negotiation afterwards took place between the tenant and the landlord personally. The landlord wrote a letter promising tenant a lease for fourteen years "at the rent and terms agreed upon," to which the tenant replied by a letter giving an unqualified acceptance. Held, that parol evidence was admissible to connect the surveyor's report and the tenant's first letter with the subsequent ones, and to identify the "terms agreed upon." It being conclusively established that no rent or terms had been agreed upon, other than those mentioned in the report, there was a sufficient memorandum under the statute of frauds. This case well illustrates the nature and use of parol evidence to explain the reference by showing what it applies to, and by identifying the writing which contains the terms to which the reference is made and which are thereby adopted.

(1) *Clinan v. Cooke*, 1 Sch. & Lef. 22. An agreement containing no reference to a certain advertisement concerning the property, it was held that such advertisement could not be used to supply a term. S. P., in *O'Donnell v. Leman*, 43 Me. 158; *Montucute v. Maxwell*, Str. 236; *Freeport v. Bartol*, 3 Greenl. 345; *Morton v. Dean*, 13 Met. 388; *Ide v. Stanton*, 15 Vt. 690; *Nichols v. Johnson*, 10 Conn. 198; *Abeel v. Radcliff*, 13 Johns. 300; *Moale v. Buchanan*, 11 Gill & Johns. 314; *Adams v. McMillan*, 7 Port. (Ala.) 73; *Waul v. Kirkman*, 5 Cush. (Miss.) 823; *O'Donnell v. Leman*, 43 Me. 158; *Blair v. Snodgrass*, 1 Sneed, 1; *Willey v. Robert*, 27 Mo. 388; *Boardman v. Spooner*, 13 Allen, 358; *Stocker v. Partridge*, 2 Rob. Sup. Ct. 193; *Tallman v. Franklin*, 3 Duer, 895. An offer by letter may be proved by parol to have been accepted by the plaintiff. *Watts v. Ainsworth*, 6 L. T. (N. S.) 252. The paper referred to as containing the terms must be certain and definite enough, in order that the contract may be gathered from it with certainty. *Brodie v. St. Paul*, 1 Ves. 326; *Bovdell v. Drummond*, 11 East, 142.

mere written admission of an agreement, without stating, or in any way ascertaining its terms, is not a compliance with the statute.(1)

SEC. 83. 2. When a writing, signed or unsigned, contains a part only of the contract, letters or other papers may complete it by supplying the other terms, and the signatures if it be unsigned. In this case there must be a reference, and parol evidence may be used for the same purpose, and under the same circumstances, as in the last mentioned case.(2)

SEC. 84. 3. Finally, the memorandum may consist wholly in letters, which, taken together, constitute the contract. This is often the case where the agreement results from negotiation. The letters must clearly show that the minds of the parties have met upon exactly the same points; that the proposals, on the one side, have been accepted on the other; and they must refer to each other in such a manner as to show the common object of the writers. Parol evidence may be resorted to for the purpose of identification and explanation.(3) It is

(1) *Clerk v. Wright*, 1 Atk. 12; *Rose v. Cunynghame*, 11 Ves. 550.

(2) *Warner v. Willington*, 3 Drew. 523. An extreme case. The defendant, as the lessee, had signed a memorandum of an agreement for a lease, which, however, did not contain the lessor's name, and was, therefore, defective. He subsequently wrote a letter concerning it, which gave the lessor's name, but at the same time abandoned the purpose of leasing, and withdrew the memorandum. V. C. KINDERSLEY held that the memorandum and the letter together made out all the terms, and formed a completed contract, although the object of the letter, as a whole, was to repudiate the agreement. This case has been severely criticised, on the ground that the letter should have been taken as a whole, and it is of very doubtful authority. See per L. J. TURNER, in *Wood v. Midgley*, 5 DeG. M. & G. 41, 46; and *Goodman v. Griffiths*, 26 L. J. Ex. 145; *Gosbell v. Archer*, 2 A. & E. 500; *Dobell v. Hutchinson*, 3 A. & E. 371; *Richards v. Porter*, 6 B. & C. 437; *Cooper v. Smith*, 15 East, 103.

(3) *Western v. Russell*, 3 V. & B. 187; *Thomas v. Blackman*, 1 Coll. C. C. 301; *Brettell v. Williams*, 4 Wels. H. & G. 623; *Owen v. Thomas*, 3 My. & Ke. 353; *Verlander v. Codd*, Turn. & Russ. 352; *Parkhurst v. Van Cortlandt*, 14 Johns. 15; *Tallman v. Franklin*, 14 N. Y. 584; *Lerned v. Wannemacher*, 9 Allen, 416; *Huddleston v. Briscoe*, 11 Ves. 583; *Howard v. Okeover*, cited 3 Swanst. 421; *Forster v. Hale*, 5 Ves. 308; *Matteson v. Scofield*, 27 Wisc. 671; *Lyman v. Robinson*, 14 Allen, 242; *Prince v. Prince*, 12 Jur. (N. S.) 221; *Canton Co. v. Northern*, etc., R. R. 21 Md. 383, and cases cited, *ante*, §§ 82, 83. *Nesham v. Selby*, L. R. 7 Ch. 406; *id.* 13 Eq. 191, well illustrates the necessary features of a correspondence in order to constitute a binding contract. It was a suit by the owner to enforce specific performance of an agreement to take a lease of a house, which defendant denied. There had been a verbal agreement, and to satisfy the statute of frauds, the plaintiff relied upon a letter of the defendant, in which he agreed to take a lease of the house for seven years on certain terms, but did not state the day on which the letting was to commence; and a second letter in which defendant did state the day of commencement, but added new conditions, which

not essential that the letter should be addressed by one of the contracting parties to the other; since the statute of frauds is only concerned with the evidence by which an agreement is to be established, a letter written by one of the parties to a third person will be a sufficient memorandum, provided it contains the terms itself, or adopts them as stated in another writing, and provided there is a sufficient signing.(1)

SEC. 85. 3. *The contents of the memorandum.*—The memorandum, whether consisting of one writing or of several, must contain all the essential terms of the agreement so stated, that, while parol evidence may, perhaps, be resorted to for purposes of identification and to explain the situation of the parties and of the subject-matter, it shall not be required to supply any substantive feature which has been omitted.(2) While the memorandum must thus embrace the substance of the contract, it need not describe the terms in a complete and detailed manner;(3) it is enough that what the parties have really assented to, can be gathered from the writing, and is not left to the recollection of witnesses. When this requirement is complied with, the demands of the statute are satisfied, however brief and informal the document may be. When it is clear that the parties have actually agreed, the courts are anxious and have often been very astute to discover that agreement in the writing which purports to contain its terms, and have sometimes, I think, gone very far towards a practical repeal of the statute.(4)

the plaintiff did not accept. *Held*, that the letters, either taken singly or together, did not constitute a sufficient memorandum. The first letter was defective in omitting an essential term of the contract; the second, by adding new conditions, which plaintiff had not accepted, left the entire contract unconcluded. See *Crossly v. Maycock*, L. R. 18 Eq. 180.

(1) See the point thoroughly discussed, although arising under another clause of the statute, and decided in *Gibson v. Holland*, L. R. 1 C. P. 1; *Welford v. Beazely*, 3 Atk. 503; *Child v. Comber*, 3 Sw. 423, n.; *Seagood v. Meale*, Prec. in Ch. 560; *Barkworth v. Young*, 4 Drew. 1, 13.

(2) *Parkhurst v. Van Cortland*, 1 Johns. Ch. 274; *Coles v. Bowne*, 10 Paige, 526.

(3) *Ives v. Hazard*, 4 R. I. 14. The nature and essentials of the memorandum are well stated by Sir G. JESSSELL, M. R., in *Potter v. Puffield*, L. R. 18 Eq. 44, and in *Joseph v. Holt*, 37 Cal. 250, 253, by SANDERSON, J.

(4) *Barry v. Coombe*, 1 Pet. 640. The following examples of documents held to be sufficient memorandums, under the statute, will serve to illustrate the statement of the text. Receipt for the purchase-money of land, *Barickman v. Kuykendall*, 6 Blackf. 21; *Ellis v. Deadman*, 4 Bibb. 467; *Evans v. Prothero*, 13 Eng. Law & Eq. 163; a stated account in which a vendor of land charges himself with the price, *Barry v. Coombe*, 1 Pet. (U. S.) 640; *Denton v. McKenzie*, 1 Desaus. Ch. 289; *Bourland v. Co. of Peoria*, 16 Ill. 538; an order, *Lerned v. Wanne-*

Sec. 86. The memorandum must contain the substantive terms of a concluded contract, as has already been shown.(1) It will not satisfy

macher, 9 Allen 416; return of a sheriff on execution, *Hanson v. Barnes*, 3 Gill & Johns. 359; *Fenwick v. Floyd*, 1 Harr. & Gill. 172; *Barney v. Patterson*, 6 Har. & Johns. 182; *Nichol v. Ridley*, 5 Yerg. 63, *Elfe v. Gadsden*, 2 Rich. 373; entry in an auctioneer's book containing purchaser's name, price, etc., *Gill v. Bicknell*, 2 Cush. 355; *Coles v. Frecothick*, 9 Ves. 234; *Buckmaster v. Harrop*, 7 Ves. 341; *Blagden v. Bradbear*, 12 Ves. 466; *Morton v. Dean*, 13 Met. 385; *McComb v. Wright*, 4 Johns. Ch. 659; *Cleaves v. Foss*, 4 Greenl. 1; *Singstack v. Harding*, 4 Har. & Johns. 186; *Smith v. Jones*, 7 Leigh, 165; *Adams v. McMillan*, 7 Port. (Ala.) 73; *Gordon v. Sims*, 2 McCord Ch. 164; *Endicott v. Penny*, 14 Sm. & Marsh. 157; so of sheriffs and their deputies, *Christie v. Simpson*, 1 Rich. 407; *Endicott v. Penny*, 14 Sm. & Marsh. 157; *Robinson v. Garth*, 6 Ala. 204; *Ennis v. Waller*, 3 Blackf. 472; *Brent v. Green*, 6 Leigh, 16; *Carrington v. Anderson*, 5 Munf. 32; ditto administrators, *Smith v. Arnold*, 5 Mason, 417; ditto court commissioners, *Jenkins v. Hogg*, 2 Const. (S. C.) 821; *Gordon v. Sims*, 2 McCord Ch. 164; *Hutton v. Williams*, 35 Ala. 503; vote of a corporation entered on their books and signed by their clerk is, *Tufts v. Plymouth Gold Min. Co.*, 14 Allen, 407; *Johnson v. Trinity Ch. Soc.*, 11 Allen, 123; *Chase v. Lowell*, 7 Gray, 33; *Rhoades v. Castner*, 12 Allen, 130. *Clark v. Burnham*, 2 Story, 1: "Ellsworth, Dec. 15, 1834. Received of D. B. & C. S. C. \$1,000, to be accounted for if they shall furnish me satisfactory security for certain lands on the Naraguagus river, say 119,000 acres for \$113,000, on or before Friday morning next; otherwise to be forfeited—John Black." Held, a sufficient agreement to sell the lands. *Westervelt v. Matheson*, 1 Hoff. Ch. 37: "Received from A. \$20 on account of the purchase of a house and lot, No. 33 Hammond street, at \$2,900, subject to a lease to B. for four years from the first of May next; \$1,000 may remain by bond and mortgage; the balance the first of May, when the deed will be executed and possession given," a binding contract for the sale of land. *Hatcher v. Hatcher*, 1 McMullen Ch. 311. A.'s land was to be sold on execution B. verbally agreed with A. to purchase it at the sheriff's sale with his own money, and to reconvey to A. when the latter should refund him the purchase-price. A. afterwards made a part payment and B. gave him a receipt, stating that the sum received was in part payment for the land, describing it and adding, "this in part payment to redeem the land from B." Held, that this receipt was a sufficient memorandum of the contract to reconvey, and that the consideration might be shown by reference to other written evidence. *Little v. Pearson*, 7 Pick. 301. B. gave A. a note for \$100, payable to A. or order on demand, with the following clause subjoined: "N. B. This note to be given up when I give him a deed of the land what I have engaged to give him," signed B. This document was held to be a sufficient memorandum of an agreement to convey upon which to decree a specific performance. This decision, I think, trenches upon the statute, and cannot be reconciled with several others. Granting that all the rest of the contract is stated, the subject-matter is actually not described. Parol evidence is requisite to do far more than merely identify the particular parcel of land mentioned in the writing; it must in fact supply this term, which is left wholly resting in the verbal agreement. See by way of contrast *King v. Wood*, 7 Mo. 389; *Ellis v. Deadman*, 4 Bibb. 466, the following: "4th January, 1808. Received of I. Ellis \$500, in part pay of a lot bought of me, in the town of V., it being the cash part of the purchase of said lot. N. Deadman," was held not to be a sufficient memorandum.

(1) See *ante*, section III. of this chapter.

the statute as being "the agreement or a note or memorandum thereof in writing," where any part of the intended contract—*i. e.*, of the very contract of which it purports to be a memorandum—is left to further negotiation; (1) and *a fortiori* when the entire arrangement is still in the condition of negotiation so that one party may withdraw; (2) or where it leaves any term or terms of the contract for future settlement; (3) or it contains only certain matters which have been agreed upon as the preliminaries to, or basis of, the intended contract, and not the final contract itself. (4) These instances of imperfect memorandums should be carefully distinguished from the cases which are controlled by the doctrine already discussed, namely, that if there has been a final agreement and the terms of it evidenced

(1) *Ogilvie v. Foljambe*, 3 Mer. 53; *Stratford v. Bosworth*, 2 V. & B. 341; *Tawney v. Crowther*, 3 Bro. C. C. 318; *Roberts v. Tucker*, 3 Wels. H. & G. 632; *Barry v. Coombe*, 1 Pet. (U. S.) 640; *Ballingall v. Bradley*, 16 Ill. 373; *Hazard v. Day*, 14 Allen, 494. It should be observed, however, that the contract of which the memorandum is the evidence, may be wholly concluded and binding, although the parties in the same document make reference to another distinct matter yet resting in negotiation and concerning what they intend or desire to contract at some future time.

(2) *Lord Glengal v. Barnard*, 1 Keen, 769.

(3) *Honeyman v. Marryatt*, 21 Beav. 14; 6 H. L. Cas. 112; *Wood v. Midgley*, 5 DeG. M. & G. 41. In the first of these two cases, H.'s solicitor had written offering 25,000*l.* for a certain estate advertised to be sold by M. M.'s solicitor answered by letter: "Mr. M. has authorized us to accept the offer, subject to the terms of a contract being arranged between his solicitors and yourself. Mr. M. requires a deposit of from 1,200*l.* to 1,500*l.* and the purchase to be completed at midsummer day next." This letter simply accepted the proposed price, but left all the rest of the contract unfinished, and these terms never being concluded, a specific performance at the suit of H. was therefore refused. The memorandum is not valid, if it refer to the alleged agreement and repudiate it, declaring it not binding, *Wood v. Midgely*, 5 DeG. M. & G. 41; *Goodman v. Griffiths*, 38 Eng. L. & Eq. 491; *Archer v. Baynes*, 5 Wels. H. & G. 625; *Richards v. Porter*, 6 B. & C. 437; *Cooper v. Smith*, 15 East, 103; or if it make variations or conditions, *William v. Bacon*, 2 Gray, 387; *Jenness v. Mt. Hope Co.*, 53 Me. 20; *Smith v. Surman*, 9 B. & C. 561. But a writing may be a binding memorandum contrary to the special design of the party in executing it; as where defendant wrote a letter declining to sign a draft of the agreement which had been previously made, but saying that his word should be as good as his bond; this letter was held to be a good memorandum. It will be noticed that he did not repudiate the verbal contract already made; but, on the contrary, announced his determination to be bound by it, and only refused to sign the draft, and therefore his letter was very properly held to supply the place of his signing. *Tawney v. Crowther*, 3 Bro. C. C. 318. See, also, in this connection, *Jackson v. Lowe*, 1 Bing. 9; *Dobell v. Hutchinson*, 3 A. & E. 355; *Saunderson v. Jackson*, 2 B. & P. 238; *Fitzmaurice v. Bayley*, 38 Eng. L. & Eq. 136; *Bailey v. Sweeting*, 30 L. J. C. P. 150; *McClellan v. Nicholle*, 4 L. T. (N. S.) 863.

(4) *Frost v. Moulton*, 21 Beav. 596.

in a manner to satisfy the statute of frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties.(1)

SEC. 87. What are the essential or substantive features of the agreement which must appear on the face of the memorandum in order that it may comply with the requirements of the statute? They are: 1, the parties; 2, the subject-matter; 3, the promises upon both sides; 4, the price; and under the original and ordinary language of the statutory provision, 5, the consideration. If the memorandum consists of two or more papers, a part of these terms may be found in one writing, and a part in another.(2)

SEC. 88. *Parties.*—To satisfy the statute of frauds the memorandum of an agreement must contain either the names of the contracting parties or such a description of them that there cannot be any reasonable doubt as to their identity. In applying this rule, agents, by whom the memorandum is executed, are considered as equivalent to the parties themselves. The names, when expressed, may be included in the body of the instrument, or may be subscribed at its close. If a party is not named but is described, the description must be such that its application to the particular person intended will appear certain and direct by means of extrinsic evidence describing the situation and surrounding circumstances of the subject-matter; the description must point to an individual and extrinsic evidence be needed only to identify him. Thus, in a contract for the sale of land, a memorandum is insufficient, in which the only description of one of the parties, whose name nowhere appeared, is the word "vendor." (3) The

(1) Per Lord Chan. WESTBURY, in *Chinnock v. Marchioness of Ely*, 4 DeG. J. & S. 638, 646, and see *ante*, § 63.

(2) As in the common case of "bought and sold notes," and in contracts concluded by letters as described, *ante*, §§ 82-84. Thus it has been shown that a letter may contain the signature only, and adopt by reference the other terms which are all found in a separate unsigned document.

(3) The doctrine of the text is illustrated by the following cases: *Potter v. Duffield*, L. R. 18 Eq. 4. Real estate was sold at auction. The particulars and conditions did not give the names of the vendors, nor state in any manner who they were, but simply spoke of them as the "vendors or the vendor," and announced that one "B." was the auctioneer. The purchaser of a lot signed a memorandum acknowledging his purchase, and B. wrote and signed at the foot thereof as follows: "Confirmed on behalf of the vendor B." In a suit against the vendee it was held by JESSEL, M. R., that this memorandum did not sufficiently show the parties—the vendor, and a specific performance was refused. This

cases in the foot-note show, however, that a slight and general description is enough, if serves to point out the party, and renders his identification by extrinsic evidence possible. How far parol evidence may be used to explain the memorandum in relation to the parties, and and to define the relations in which they stand to each other, and to

case is distinguishable from some to be soon cited, in which contracts made by agents on behalf of undisclosed principals have been sustained, from the fact that the agreement here does not purport to be that of the agent as the contracting party; it purports to be signed by the agent on behalf of some party, and who that party was, is not shown. If the sale had been made in B.'s name, and the memorandum signed by him as the vendor, then his principal, the real owner, could have enforced it. This case should be compared with *Sale v. Lambert*, L. R. 18 Eq. 1, also decided by JESSEL, M. R. Upon a sale of lots at auction the "particulars" stated that the sale was by direction "of the proprietor," but the vendor's name did not appear. A memorandum of sale indorsed on a copy of these particulars was signed by the purchaser and by the auctioneer, "on behalf of the vendor." In an action for a specific performance by the vendee, it was held that the vendor was sufficiently *described*, and that the memorandum was good under the statute of frauds. These two cases appear to be analogous, but are clearly distinguishable. In the former one the memorandum simply described the party as "the seller," which give no clue to his identity—that is, the supplying this term of the contract was *wholly* due to parol evidence. In the latter case, the party is described as "the owner" of the land. As the owner must be some definite individual, the only use of parol evidence was to identify the person thus designated. In *Hood v. Lord Barrington*, L. R. 6 Eq. 218, a sale was made by the executors of the deceased owner who had legal authority to do so. The particulars of the sale stated that the property belonged to Admiral F., deceased, and that the sale was by direction of his executors, not naming them. A memorandum of sale indorsed on a copy of the particulars was signed by A. and B., agents "for the vendors." *Held*, by Lord ROMILLY, M. R., that the memorandum was sufficient and the contract binding. Here the description was plainly sufficient. *Commins v. Scott*, L. R. 20 Eq. 11. An agreement to sell land did not disclose the name of the vendor; but it appeared from the document that the vendor was a company in possession of the premises sold, and that it carried on operations therein. The M. R. JESSEL held that the vendor was sufficiently described to satisfy the statute. Also, *Champion v. Plummer*, 1 B. & P. (N. R.) 252; *Waterman v. Meigs*, 4 Cush. 497; *Nichols v. Johnson*, 10 Conn. 192; *Sherburne v. Shaw*, 1 N. H. 157; *Webster v. Ela*, 5 id. 540; *Farwell v. Lowther*, 18 Ill. 252; *Sheid v. Stamps*, 2 Sneed, 172. In *Champion v. Plummer*, which is the leading case, decided by the Ch. of Exch. Chamb., Sir JAMES MANSFIELD, C. J., stated the doctrine as follows, which was adopted by the court: The vendor's name appeared, but not the purchaser's in any manner. "How can that be said to be a contract or memorandum of a contract which does not state who are the contracting parties? By this note it does not at all appear to whom the goods were sold. It would prove a sale to any other person as well as to the plaintiff. There cannot be a contract without two parties, and it is customary, in the course of business, to state the name of the purchaser as well as the seller, in every bill of parcels. This note does not appear to me to amount to any memorandum in writing of a bargain."



the subject-matter, has been discussed in recent cases arising under the clause of the statute concerning the sale of chattels, and the doctrines which they establish may be applied to agreements governed by the clauses now under examination. When a memorandum of sale states the two parties by name or description, but does not indicate, either expressly or by inference, which is the seller and which the buyer, can extrinsic evidence be used to distinguish the parties, and thus explain the nature and effect of the contract?(1) The following rule is clearly established by these cases. It must appear in the body of the instrument, or in the signatures, either expressly or by description, who the parties are; an agent being considered as

(1) *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446. Action by the company to recover the price of goods alleged to have been sold to defendant, Goddard. Plaintiff relied wholly on the following memorandum: "Sept. 19. W. W. Goddard; 12 mo's; 300 bales S. F. drills,  $7\frac{1}{4}$ ; 100 cases blue ditto,  $8\frac{3}{4}$ . Credit to commence when ship sails; not after Dec. 1. (Signed) R. M. M.; W. W. G." W. W. G. were the initials of defendant. R. M. M. were initials of one Mason, an agent of the plaintiff. Defendant contended that this memorandum could not be explained by parol evidence; that it did not state the parties; but if it did—by means of the signature of plaintiff's agent, R. M. M.—it did not state which was the seller and which was the buyer. There was no dispute that the mercantile abbreviations could be explained. The court held that the signature "R. M. M."—which was conceded to be as effective as though the name was written in full—sufficiently stated the plaintiff as a party, so that it could sue on the contract made by its agent; and that which of the parties was the buyer and which the seller could be proved by parol evidence. CURTIS, J., dissented, being of opinion that the memorandum should indicate, in terms, which party sells and which buys. *Vandenburgh v. Spooner*, L. R. 1 Ex. 316. Action for goods sold. Plaintiff relied on the following memorandum: "D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenburgh, now lying at, etc., at 1s. per foot. D. Spooner." *Held*, not a sufficient memorandum. The court said (p. 319): "Can the essentials of the contract be collected from this document by means of a fair or reasonable intendment? We have come to the conclusion that they cannot, inasmuch as the seller's name, *as seller*, is not mentioned in it, but occurs only as part of the description of the goods." This case may be completely reconciled with the preceding and the following; by the fact that in the memorandum the seller's name does not appear *as a party at all*; there is not the slightest intimation that Vandenburgh was the other contracting party. In all the other cases both the *parties* do appear, although their position towards each other is not disclosed by the writing. *Newell v. Radford*, L. R. 3 C. P. 52. Action by a vendee against the vendor for non-delivery of goods. It was proved by parol that plaintiff was a baker, defendant a dealer in flour, and John Williams was defendant's agent. J. W. came to plaintiff's store and solicited orders, and finally wrote the following in the plaintiff's book: "Mr. Newell, 32 sacks of (a certain kind of flour), at 39s.; to wait orders. June 8. John Williams." The flour was not delivered. The defense rested upon the insufficiency of the memorandum, as it did not show who was seller and who buyer, and that parol evidence could not be admitted. *Held*, that the agent's name was the same as

equivalent to a party, where the agreement purports to be made by him. Extrinsic evidence can then be introduced to explain the situation and relations of these parties, their business, the circumstances surrounding the transaction, and the like, whence it will at once appear which is the vendor and which the vendee. This use of parol evidence is no more than that which is always proper in the interpretation of wills, deeds, and other written instruments.

SEC. 89. When the agreement is executed by an agent in his own name, he appearing to be the contracting party, the requisite as to parties is complied with. The principal may maintain a suit and enforce the contract, and it is immaterial whether the principal was actually known during the transactions, or whether the other party supposed that he was dealing with the agent personally, entirely on his own behalf.(1) Under the same circumstances, it is now the rule that a suit may be maintained, and the contract enforced against the principal, even though his name nowhere appears on the face of the writing, and even though he was undisclosed and unknown to the other party at the time of entering into the agreement, provided, of course, it was actually made on his behalf.(2) In both of these cases,

though the defendant's name had been signed, and that extrinsic evidence was admissible to show which was the seller and which the buyer; that such evidence does not alter nor add to the contract, but merely explains the surrounding circumstances and situation of the parties, which may always be done. This decision is identical with that in Howard's Reports.

(1) *Heard v. Pilley*, L. R. 4 Ch. 548. Suit for a specific performance by a vendee. The defendant, Pilley, who was an agent of the plaintiff, under a parol authority, made a written contract with defendant, Sugden, in his own name; the fact that he was really acting as agent for the plaintiff not appearing, from the case, to have been disclosed. The bill sought to obtain a specific performance against S., and to have it declared that the contract made by P. was made on behalf of the plaintiff, and the relief was granted. Also, *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446; *Higgins v. Senior*, 8 M. & W. 834; *Hicks v. Whitmore*, 12 Wend. 548; *Sims v. Bond*, 5 B. & Ad. 389, 393, per Lord DENMAN. "It is a well-established rule that when a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it."

(2) The leading case in support of this rule is *Higgins v. Senior*, 8 M. & W. 834, in which PARKE, B., thus states the doctrine: "There is no doubt that where such a written agreement is made, it is competent to show that one or both of the contracting parties were agents for others, and acted as such agents in making the contract, so as to give the benefit on the one hand to, and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the statute of frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind, but shows that it also binds another.

in order that the rules as stated may be operative, the writing must be unsealed wherever the common-law doctrine as to the effect of a seal, is retained; but it should be remembered that in many of the states all distinction between sealed and unsealed instruments has been abolished by statute.(1)

SEC. 90. *The subject-matter.*—The subject-matter of the agreement must all be included in the memorandum, and must be described with sufficient exactness to render its identity certain upon the introduction of extrinsic evidence simply disclosing the situation of the parties at, and immediately before, the time of making the contract.(2)

But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party is not such, would be to allow parol evidence to contradict a written agreement, which cannot be done." This decision and reasoning of Baron PARKE have, not without some dissent, been adopted by the courts of this country as well as of England, and the rule is established even in states whose earlier doctrines were very strongly the other way. See *Beckham v. Drake*, 9 M. & W. 79; *Jones v. Littledale*, 6 A. & E. 490, per Lord DENMAN; *Newell v. Radford*, L. R. 3 C. P. 52; *Lerned v. Wannemacher*, 9 Allen, 419. Action upon a written agreement to sell a quantity of merchandise. It was signed by "Wannemacher & Maxfield," and defendant's name nowhere appeared in it. *Held*, that a suit was maintainable against defendant upon proof that W. & M. were really his agents, and were acting for him. *Dykers v. Townsend*, 24 N. Y. (10 Smith) 57. On the following memorandum, "I have purchased of Dykers 500 shares of the N. Y. & E. R'y Co., at 71 p. c., deliverable in 60 days—W. S. Hoyt," the defendant, Townsend, was held liable, Hoyt having been his agent. *Ford v. Williams*, 21 How. (U. S.) 287; *Beer v. London & Paris Hotel Co.*, L. R. 20 Eq. 412, 426, per MALINS, V. C. A contract of sale signed by an auctioneer on behalf of an undisclosed proprietor is valid under the statute of frauds, and enforceable against him; and to the same effect is *Walsh v. Barton*, 24 Ohio St. 28. The doctrine, as stated in the text, is denied by some American cases. Thus, in *Morgan v. Bergen*, 3 Neb. 209, it was held that a contract for the sale of land must be in the principal's name; that if the agent sign in his own name, either for himself or for his principal, it is his contract alone.

(1) See *ante*, § 57. See, to this effect, *Briggs v. Partridge*, 64 N. Y. 357.

(2) *McMurray v. Spicer*, L. R. 5 Eq. 527. Suit by a vendor for a specific performance. The defendant agreed, in writing, to purchase from the plaintiff "the mill property, including cottages, in Esther village—all the property to be freehold." The subject-matter being fully identified by parol evidence, it was *held*, by MALINS, V. C., that the contract was not void for ambiguity, since parol evidence was admissible for purpose of identification. In *King v. Wood*, 7 Mo. 389, the memorandum of an agreement to sell "all that piece of property known as the Union Hotel property," was held to be fatally defective, since parol evidence was necessary to show what was intended to be sold. The decision was clearly wrong under the authorities. Parol evidence, merely showing that vendor was owner of premises known by that designation, would at once have identified the subject-matter with absolute certainty. As to description of land, see *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Lindsay v. Lynch*, 2 Sch. & Lef. 1; *Harnet v. Yielding*, 2

Parol evidence is admissible to show the surrounding circumstances and position of the parties, and thus to explain the meaning and application of the descriptive language, and thereby to identify the

Sch. & Lef. 549; *Montacute v. Maxwell*, 1 P. Wms. 618; *Ives v. Armstrong*, 5 R. I. 567; *Talman v. Franklin*, 3 Duer, 395; *Force v. Dutcher*, 3 C. E. Green, 461; *Ferguson v. Staver*, 33 Pa. St. 411; *Church of the Advent v. Farrow*, 7 Rich. Eq. 378; *Meadows v. Meadows*, 3 McCord. 458; *Carmack v. Masterton*, 3 Stew. & Port. (Ala.) 411; *Pipkin v. James*, 1 Humph. 325; *Kay v. Curd*, 6 B. Mon. 103. In a contract for a lease, the memorandum must show the length of the letting—i. e., the term, and the want of it cannot be supplied by parol evidence. *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Fitz Maurice v. Bayley*, 3 L. T. (N. S.) 69; *Farwell v. Mather*, 10 Allen, 322; *Hurley v. Brown*, 98 Mass. 545; *Hodges v. Howard*, 5 R. I. 149; *Abeel v. Radcliff*, 13 Johns. 300. A description of the land which enables it to be clearly identified, is enough; for example, describing it as the vendor's right in a particular estate. *Nichols v. Johnson*, 10 Conn. 198; *Phillips v. Hooker*, Phil. Eq. (N. C.) 193; or land which the vendor had bought from a designated person. *Atwood v. Cobb*, 16 Pick. 230; and see *Simmons v. Spruill*, 3 Jones' Eq. (N. C.) 9. The following are cases of memoranda held either sufficient or insufficient: *Grace v. Denison*, 114 Mass. 15; a written agreement to convey land "for \$25,000, and mortgage to remain at five per cent for five years," held too incomplete to satisfy the statute. *Matteson v. Scofield*, 27 Wis. 671, an offer in a letter, accepted by the vendee, to sell certain land for \$3,200, \$1,000 down, and \$500 annually, with interest, the amount unpaid to be secured by a mortgage, held sufficient. *White v. Herman*, 51 Ill. 243, a description of the land is sufficient, if it enables a surveyor to locate the tract intended to be sold. *Whelan v. Sullivan*, 102 Mass. 204; but such description is insufficient, if it gives no means of identifying the boundaries of the land sold. *McGuire v. Stevens*, 42 Miss. 724; a receipt, reciting that the money was paid for a lot of land, but giving no terms of the contract, does not constitute a memorandum. *Hudson v. King*, 2 Heisk. 560; a memorandum showing only the different tracts sold, to whom, and the prices, is insufficient. *Heydock v. Stow*, 40 N. Y. 363; a written instrument, signed by the owner, authorizing a real estate broker to sell a parcel of land upon certain terms therein stated, and an agreement to purchase it upon those terms, subscribed by the vendee, written across the face of the instrument while unrevoked in the hands of the broker, do not, either alone or together, form a sufficient memorandum binding on the owner, nor does his parol assent, subsequently made, give it any validity. *Cossett v. Hobbs*, 56 Ill. 231; an owner, who had authorized certain real estate brokers to sell a piece of land, wrote on the back of one of their business cards a short description of the property and his terms, and signed it; on the same card, a purchaser wrote, "your terms are accepted," and signed it. *Held*, that these constituted a memorandum. This latter decision certainly accords with the spirit of the statute, and with the cases defining the general requisites of the memorandum much better than the decision immediately preceding does. The memorandum need not be an elaborate and perfected agreement. In the N. Y. case there was an offer by the vendor, signed by him, and, while it was unrevoked, it was accepted by the vendee. What more is necessary to constitute a contract? *Holmes v. Evans*, 48 Miss. 247; a receipt for \$100, "part payment on a piece of property, on corner of Main and Pearl streets, city of Natchez, State of Mississippi," held insufficient. *Ross v. Baker*, 72 Pa. St. 186; a purchaser bought by parol, and took a receipt for the purchase-money,

subject-matter; and all technical terms and other phrases used in a special sense, may be thus, as it were, translated. But if, by this means, the subject-matter is not certainly ascertained, parol evidence cannot be used to go farther, and actually supply a substantive part of the agreement, which has been entirely omitted from the memorandum or insufficiently expressed. It is enough that the subject-matter is *substantially* stated, and that no material portion of it is left to be wholly supplied by parol evidence; it need not be set forth, with all its details, with perfect, exhaustive accuracy, and this limitation applies with equal force to all the other terms of the contract, the promises, and the consideration.(1) The description of the subject-

which stated the amount paid to be for "the Fleming farm, French Creek;" held to be a sufficient description. *Spangler v. Danforth*, 65 Ill. 152; a letter from the vendor to his own agent, stating that the vendee had "agreed to take the pasture lot for \$2,400, \$1,000 cash, \$400 December first, 1871, at ten per cent, and \$1,000 July first, 1872, at ten per cent, secured by mortgage," and directing the agent to "make out the papers," and acknowledging the receipt of \$20; held to be a good memorandum. To the same effect is *Moss v. Atkinson*, 44 Cal. 3, 16; a letter by owner of land, P., addressed to one M., stating that he had agreed with the purchaser H., to sell H. the land, and giving the terms of the agreement and the price, and describing the land as "the land now claimed by him, P., on Dry Creek, some 200 acres of bottom land, and 700 acres of upland," was held to constitute a valid memorandum under the statute. *Mead v. Parker*, 115 Mass. 413; the description, in a contract of sale, "a house on Church street," held sufficient, and parol evidence admissible for purpose of identification. *Riley v. Farnsworth*, 116 Mass. 223; a memorandum of a sale at auction, which stated the parties, price, description of the subject-matter, and the fact of a part payment, but did not contain the "conditions of sale," which, it said, "the vendor shall in all respects fulfill," was held to be insufficient. If these conditions of sale were written on a separate paper or printed, then this decision is clearly erroneous, and in direct conflict with the universal practice in England, and with all the cases which hold that the memorandum may be completed by another paper, to which reference is made. Here there was a plain reference to such conditions, if they were on a separate paper. If the conditions were verbal, the decision is as clearly correct. *Vassault v. Edwards*, 43 Cal. 458, 462. An offer to sell land was written and signed by the vendor, the defendant, and stated that he had sold to the purchaser, the plaintiff, the land for \$4,500, and had received \$50 in part payment, and added: "This sale is subject to a search of, and approval of the title, and if the title is rejected or [as] bad, I agree to refund to the said V. (the vendee) the \$50 paid on account; but if the title be approved, I agree to convey the above premises to the said V. on receiving the balance of the purchase-money as above. And I hereby allow to the said V. twenty days for the examination of the title." This offer, on being accepted by the purchaser, was held to constitute a valid contract.

(1) *Ives v. Hazard*, 4 R. I. 14. An estate, upon which certain annuities were charged, was sold subject to them. A memorandum which, in describing the estate, mentioned the annuities, and stated the time when their payment by the purchaser was to begin, but did not specify the particulars in relation to them, was held sufficient.

matter may be wholly or partially contained in an auxiliary writing, which, if referred to in such a manner as to establish the connection, becomes a constituent part of the memorandum; or the accompanying document may be simultaneously with the memorandum signed, or otherwise authenticated by the parties, so as to show that the two are to be taken together and to form one agreement.(1) But advertisements, hand-bills, notices, or other writings, used at or before the sale, cannot be used to control or affect the description contained in the agreement, unless they are thus connected and virtually adopted by a reference or a simultaneous execution.(2)

SEC. 91. *The promises*.—In like manner the promises of both the parties, so far as they are executory, must all be included in the memorandum—whether it be one or more writings—so that parol evidence shall not be necessary to ascertain anything which the parties have undertaken to do or to omit. Every written contract pre-supposes a prior verbal agreement which it embodies—in fact, the writing is the *evidence* of the agreement, and not the essence of it. The memorandum, in order to satisfy the statute of frauds, must contain all the stipulations and undertakings of the verbal bargain. If any of these stipulations are omitted, then the memorandum—although the parts which it does contain might, by themselves, make a complete contract—is not a note or memorandum of the agreement as required by the statute, and cannot be enforced at law or in equity.(3)

(1) *Nene Valley Drainage Comm'rs v. Dunkley*, L. R. 4 Ch. D. 1. Suit by vendors for a specific performance. The commissioners agreed to sell certain property to D. The agreement did not refer to any plan, but the agents who signed it for the parties at the same time signed the following memorandum, written upon a plan of the property: "Plan of property sold to and purchased by D., Oct. 22, 1874. N. B., the property included in the purchase is edged with red color." *Held*, that the plan was sufficiently incorporated, and the description in the agreement was controlled by it—by *JESSEL, M. R.*, and by the Court of Appeals.

(2) *Clinan v. Cooke*, 1 Sch. & Lef. 22; *O'Donnell v. Leman*, 43 Me. 158.

(3) *Jervis v. Berridge*, L. R. 8 Ch. 351; *McLean v. Nicoll*, 7 H. & N. 1024. The parties made a verbal agreement for the sale of some goods; a writing was afterward signed which omitted one of the collateral stipulations, and the court held that there was no sufficient memorandum to bind the defendant. *Jervis v. Berridge*, *supra*, is directly in point. Plaintiff agreed to buy an estate from the L. Society, and to pay a deposit on signing the contract. Before signing plaintiff verbally agreed with Berridge to assign the contract to him on certain terms. Plaintiff thereupon gave B. a written memorandum assigning the contract to him in consideration of his paying the deposit to the L. Society, and agreeing to pay a certain sum to the plaintiff; the other terms of the verbal bargain between B. and the plaintiff, which were favorable to the plaintiff, were at B's request omitted from this written memorandum. The contract between plaintiff and the L. Society was then signed, and the plaintiff's copy delivered to B. who paid the

In a contract of sale, when a credit is stipulated for as part of the agreement, the rule is well settled at law that this is a material term of the agreement, and must be stated in the memorandum.(1) But this does not seem to have been regarded as essential by courts of equity in suits for a specific performance.(2) The time and place of performance are not necessary terms of a valid memorandum, because in their absence the law supplies these by its implication; (3) but where a time for performance has been expressly agreed upon as a part of the contract and thus made a condition, it must appear as a constituent part of the memorandum.(4)

SEC. 92. *The consideration.*—That the consideration is a part of the agreement and must be included in the memorandum, was long ago settled in England, and the doctrine has been followed in many American states whose statutes are similar in form to the English; in others it has been repudiated. In a large number of the states, however, the question has been put at rest by a change in the statutory language; in some, by a provision expressly requiring the consid-

deposit. B. afterward repudiated all the stipulations of his verbal agreement with the plaintiff which had not been inserted in the memorandum. Plaintiff thereupon commenced this suit against B. and the Loan Society, seeking to have the agreement between B. and himself declared rescinded, and a conveyance to himself from the L. Society in pursuance of his contract with it. *Held*, affirming V. C. MALINS, that the memorandum was only ancillary to the verbal bargain between B. and the plaintiff, and any use of it by B. for a purpose inconsistent with that bargain was fraudulent; as B. had repudiated the verbal agreement, the plaintiff could fall back on his original rights under his agreement with the L. Society. Here the defendant B. was not bound by the verbal terms of his agreement because they were not written. On the other, hand the plaintiff was not bound by the written memorandum, *because it did not include all the terms of his verbal agreement with B.*; and this was so held, although the memorandum taken by itself had all the elements of a perfect, certain, and complete contract, and the omitted terms were not left out by mistake or through fraud, but by design.

(1) *Buck v. Pickwell*, 1 Will. (Vt.) 167; *Morton v. Dean*, 13 Metc. 388; *Davis v. Shields*, 26 Wend. 341; *Wright v. Weeks*, 3 Bosw. 372; *McFarson's Appeal*, 11 Pa. St. 503; *Soles v. Hickman*, 20 Pa. St. 180; *Elfe v. Gadsden*, 2 Rich. 373; *Ellis v. Deadman*, 4 Bibb, 467.

(2) See *Smith v. Jones*, 7 Leigh, 165. It is difficult to see any grounds for this distinction between the two courts. Credit would appear to be a very material term, unless, indeed, the time had expired before the suit was brought, and the plaintiff showed a performance or readiness to perform on his part, in which case the credit would no longer be a matter of consequence.

(3) *Atwood v. Cobb*, 16 Pick. 230; *Salmon Falls Manuf. Co. v. Goddard*, 14 How. 446.

(4) *Davis v. Shields*, 26 Wend. 341; reversing S. C., 24 Wend. 322; *First Baptist Church of Ithica v. Bigelow*, 16 Wend. 28.

eration to be mentioned ; in the others, by a clause expressly declaring that the consideration need not be mentioned. The doubt as to the construction and the conflict among American decisions, have chiefly arisen upon other clauses of the statute than those which relate to contracts concerning lands, and to other agreements which may be specifically enforced. I shall not, therefore, enter into a discussion which would necessarily be long and actually foreign to the purposes of this work. Practically, the question as to stating the consideration is of little importance in connection with the specific enforcement of contracts, as will appear from the next paragraph.(1)

SEC. 93. *The price.*—There is a plain distinction between the “consideration” as an essential part of and included in the “agreement,” and especially agreements to answer for the debt of another and the like, and the “price” which must, in general, be a material term of an executory contract of sale or leasing, whether the subject-matter be land or chattels.(2) It is, of course, possible that there should be a contract of sale without any price being expressly stipulated, and where the law would imply that the purchaser was to pay a reasonable or the market price for the article bought ; and such forms of contract are not very unusual in the sale of chattels. It is difficult, however, to conceive of a contract of sale or leasing which would be specifically enforced in equity, in which the price would not be a material term, and in the memorandum of which such price, unless already paid, should not necessarily be stated in order to satisfy the rules hereinbefore laid down. It is, also, difficult to conceive of a contract based upon “the consideration of marriage,” which could be specifically enforced, in the memorandum of which such consideration would not necessarily appear. The result is very clear that the questions and disputes as to the necessity of expressing the consideration, are of very little practical importance in connection with the doctrine of specific performance. In the vast majority of contracts which are specifically performed by courts of equity, the price, and therefore the consideration, will be a material term of the agreement and must appear in the memorandum, which would be incomplete without such statement.

SEC. 94. It is, therefore, well-settled that in all executory contracts

(1) For the statutory provisions on the subject of consideration, see the abstract of statutes, *ante*, § 70 ; and for a full discussion of the subject, see Browne on Stat. of Frauds, §§ 381, 381*a*, 386–408*a*, especially 391.

(2) This distinction is clearly pointed out by Mr. Browne in the passages of his work referred to in the last note.



of sale or of leasing, where the parties have agreed upon a price, such price is a material term of the contract, and must be sufficiently stated in the memorandum.(1) Of course a valid contract of sale may be made without any stipulation whatever as to price, because the law then supplies the term by implying the reasonable value of the property as the price; and in such a case the memorandum may be as silent as the parties were.(2) It is not necessary that either the contract or the memorandum should fix upon and state the price in a definite and ascertained sum; it is always enough that the parties have provided a means, and have expressed such provision in the memorandum, whereby the price can be definitely ascertained either by the acts of third persons or by evidence operating by way of reference or identification. For examples, it is enough if the agreement and memorandum state that the price is to be determined by valuers or arbitrators; (3) or is to be the same as that for which the subject-matter had been bought at a former sale.(4) If it appears from the memorandum that the price has been paid or received, the amount thereof need not be set forth, since that term of the contract having been already performed, is no longer material.(5) Parol evidence is always admissible to explain the technical ambiguous terms—which are very common in mercantile contracts—used by the parties to designate the price.(6)

SEC. 95. A verbal ante-nuptial agreement to make a settlement would, of course, be nugatory, because, as will be subsequently shown,

(1) *Clerk v. Wright*, 1 Atk. 12; *Bromley v. Jeffries*, 2 Vern. 415; *Blagden v. Bradbear*, 12 Ves. 466; *Preston v. Merceau*, 2 W. Bl. 1249; *Powell v. Lovegrove*, 39 Eng. L. & Eq. 427; *Idc v. Stanton*, 15 Vt. 691; *Buck v. Pickwell*, 1 Will. (Vt.) 167; *Ives v. Hazard*, 4 R. J. 14; *Smith v. Arnold*, 5 Mason, 416; *McFarson's Appeal*, 11 Pa. St. 503; *Soles v. Hickman*, 24 Pa. St. 180; *Kay v. Cursl*, 6 B. Monr. 103; *Parker v. Bodley*, 4 Bibb, 102; *Ellis v. Deadman*, 4 Bibb, 467; *Kinloch v. Savage*, 1 Speer's Eq. 471; *Wright v. Cobb*, 5 Sneed, 143; *Sheid v. Stamps*, 2 Sneed, 172; *Farwell v. Lowther*, 18 Ill. 252; *Barickman v. Kuykendall*, 6 Blackf. 21. When the price is thus stated a different one cannot be proved by parol. *Preston v. Merceau*, 2 W. Bl. 1249; but, *per contra*, *Bean v. Valle*, 2 Mo. 103; and see cases cited under § 148.

(2) *Hoadley v. McLaine*, 10 Bing. 482.

(3) *Cooth v. Jackson*, 6 Ves. 12; *Brown v. Bellows*, 4 Pick. 189. In regard to the enforcement of contracts which provide for the price to be fixed by valuers, see *post*, § 309, and the cases cited thereunder.

(4) *Atwood v. Cobb*, 16 Pick. 230; *Johnson v. Ronald*, 4 Munf. 77.

(5) *Holman v. Bank of Norfolk*, 12 Ala. 369; *Fugate v. Hansford*, 3 Litt. 262.

(6) *Salmon Falls Manuf. Co. v. Goddard*, 14 How. 446; *Marshall v. Lynn*, 6 M. & W. 109, per PARKE, B.; *Sarl v. Bourdillon*, 1 C. B. (N. S.) 188; *Spicer v. Cooper*, 1 Gale & Dav. 52; 5 Jur. 1036.

marriage is not a sufficient part performance; but when there has been such a verbal ante-nuptial agreement, a written contract or settlement in pursuance or upon the basis of it, made after the marriage, is valid and will be enforced.(1) But such subsequent agreement or settlement may not be upheld against intervening creditors, whose rights it would cut off.(2)

SEC. 96. *Part performance.*—As has already been shown,(3) equity will sometimes decree the specific execution of agreements for the breach of which the law can give no remedy, because the statute of frauds interposes an inseparable obstacle to the recovery of a legal judgment for damages. The doctrine was established at an early day in England that a verbal agreement, if part performed, can, notwithstanding the requirements of the statute, be enforced by a court of equity; or, to use the technical language of the books, that part performance takes a verbal agreement out from the operation of the statute.(4) This doctrine has been fully adopted in nearly all the American states, although the legislatures in several of them have materially altered the language of the act by declaring that the contract shall be “void,” instead of providing that “no action shall be maintained” upon it, in the absence of a written memorandum.(5)

(1) *Montacute v. Maxwell*, 1 P. Wms. 618; *Stra.* 236; *Hammersley v. Du Biel*, 12 Cl. & Fin. 45, 64 n.; *Taylor v. Beech*, 1 Ves. Sen. 297; *Surcome v. Pinniger*, 3 DeG. M. & G. 575; *Barkworth v. Young*, 4 Drew. 1; *Argenbright v. Campbell*, 3 Hen. & M. 144; *Albert v. Winn*, 5 Md. 66; *Satterthwaite v. Emley*, 3 Green. Ch. 489; *Livingston v. Livingston*, 2 Johns. Ch. 537; in *Randall v. Morgan*, 12 Ves. 67, Sir Wm. Grant intimated a contrary opinion.

(2) *Reade v. Livingston*, 3 Johns. Ch. 481; *Winn v. Albert*, 2 Md. Ch. 169; 5 Md. 66; *Izard v. Izard*, Bailey Eq. 236; *Andrews v. Jones*, 10 Ala. 400; *Blow v. Maynard*, 2 Leigh, 29; *Smith v. Greer*, 3 Humph. 118; *Wood v. Savage*, 2 Doug. (Mich.) 316; *Borst v. Cory*, 16 Barb. 136; *Randall v. Morgan*, 12 Ves. 67; *Battersbee v. Farrington*, 1 Sw. 106; *per contra*, see *Dundas v. Dutens*, 1 Ves. 196; *Satterthwaite v. Emley*, 3 Green. Ch. 489.

(3) See *ante*, § 30.

(4) The earliest reported case was decided by the House of Lords, April 7, 1701. *Lester v. Foxcroft*, 1 Colles's Par. Cas. 108; also cited *sub. nom.* *Foxcroft v. Lyster*, 2 Vern. 456; *Leicester v. Foxcroft*, Pre. Ch. 519, 526; *Bond v. Hopkins*, 1 Sch. & Lef. 433; *Clinan v. Cooke*, 1 Sch. & Lef. 22, 41.

(5) *Newton v. Swazey*, 8 N. H. 9, 13; *Tilton v. Tilton*, 9 N. H. 385, 389; *Annan v. Merritt*, 13 Conn. 479, 491; *Eaton v. Whitaker*, 18 Conn. 222, 229; *Hall v. Whittier*, 10 R. I. 530; *Peckham v. Barker*, 8 R. I. 17; *Meach v. Stone*, 1 Chip. (Vt.) 189; *Parkhurst v. Van Cortland*, 14 Johns. 15, 31; *Freeman v. Freeman*, 43 N. Y. 34; *Eyre v. Eyre*, 4 C. E. Green. (N. J.) 102; *Welsh v. Bayaud*, 6 C. E. Green. (N. J.) 186; *Moore v. Small*, 19 Pa. St. 461; *Greenlee v. Greenlee*, 22 Pa. St. 225; *Allen's estate*, 1 Watts & Serg. 383; *Hall v. Hall*, 1 Gill. 383, 389; *Hamilton v. Jones*, 3 Gill & J. 127; *Cole v. Cole*, 41 Md. 301; *Semmes v. Worthing-*

In several of the states the doctrine, although originating in equity, has received a statutory sanction or even basis. There are two types of these statutory provisions. One class recognizes the doctrine of part performance as enforced by courts of equity, and declares that nothing in the statute of frauds shall be construed so as to interfere with or abridge it, and thus leaves the subject, as it was prior to the legislation, wholly within the domain of equitable principles.(1) The statutes of the other class, differing from each other in their details, agree in making the doctrine a matter of legislation. As the section concerning sales of personal property requires either a written memorandum, or receipt and acceptance, or payment by the buyer, so these provisions concerning lands prescribe a writing or certain specified acts of part performance in the alternative, as the essential requisites of a valid contract.(2) How far, if at all, these statutes have modified the general rules of equity relative to part performance in their respective states will be considered in the sequel.

SEC. 97. In a few of the states, either on account of a strict construction put upon the language of their statutes of frauds, or by reason of the limited jurisdiction in equity conferred upon their courts, the doctrine of part performance has been wholly rejected, or is applied only to a partial extent and under very special circum-

ton, 38 Md. 298; *Anthony v. Leftwich*, 3 Rand. (Va.) 255; *Pierce v. Catron*, 23 Gratt. 483; *Lowry v. Buffington*, 6 W. Va. 249; *Sites v. Kellar*, 6 Hamm. (O.) 207; *Grant v. Ramsay*, 7 Ohio St. 157; *Underhill v. Williams*, 7 Blackf. 125; *School District v. Macloon*, 4 Wisc. 79; *Farrar v. Patton*, 20 Mo. 81; *Despain v. Carter*, 21 Mo. 331; *Feuiser v. Sneath*, 3 Nev. 120; *Church of the Advent v. Farrow*, 7 Rich. Eq. 378; *Ford v. Finney*, 35 Geo. 258; *Dugan v. Colville*, 8 Tex. 126; *Boze v. Davis*, 14 Tex. 331; *Howe v. Rogers*, 32 Tex. 218; *Clayton v. Frazier*, 33 Tex. 91; *Johnson v. Bowden*, 37 Tex. 621; *Gregg v. Hamilton*, 12 Kans. 333; *Morgan v. Bergen*, 3 Neb. 209; *Fall v. Hazelrigg*, 45 Ind. 576; *Northrup v. Boone*, 66 Ill. 368.

(1) See *ante*, § 70, in the statutes of N. Y.; Mich.; Minn.; Neb.; Wisc.; Ind.

(2) See *ante*, § 70, in the statutes of Alabama, which requires the contract for sale of lands, etc., to be written, etc., "unless the purchase-money or a portion thereof be paid, and the purchaser be put in possession of the land by the seller." *California*, which requires a writing, etc., "unless the contract has been part performed by the party seeking to enforce it, and such part performance has been accepted by the other." *Iowa*, which enacts that the requirement of a writing does not apply "when the purchase-money or any part thereof has been received by the vendor, or when the vendee, with the actual or implied consent of the vendor, has taken and held possession thereof (*i. e.*, of the land), under and by virtue of the contract, or when there is any other circumstance which, by the law heretofore in force, would have taken a case out of the statute of frauds." Also, that a parol contract shall be enforced when not denied in the pleadings, except against a person other than the maker of it.

stances. In Massachusetts the courts long had the power of enforcing written contracts alone;(1) but by recent legislation their equitable jurisdiction has been enlarged so as to embrace some cases, at least, of parol agreements which have been part performed.(2) In Maine, also, the equity powers of the courts are restricted to the enforcement of written contracts.(3) In North Carolina the equitable doctrine of part performance has never been admitted, and in case of a verbal contract, even if it be admitted by the defendant, provided he claims the benefit of the statute, the remedy of specific execution is refused.(4) The rule that parol contracts, which have been part performed, may be specifically enforced, has also been repudiated in Tennessee as being wholly inconsistent with the statute of frauds;(5) and is only admitted in Kentucky under special circumstances of hardship or injustice to the purchaser.(6)

SEC. 98. This doctrine of part performance, that verbal contracts, embraced within the restrictive provisions of the statute of frauds, may still be enforced when they have been part performed, belongs exclusively to equity jurisprudence and jurisdiction; it has no existence at *law*, and is, therefore, never admitted in legal actions.(7)

(1) *Jacobs v. R. R. Co.*, 8 Cush. 223; *Brooks v. Wheelock*, 11 Pick. 439; *Dwight v. Pomeroy*, 17 Mass. 303, 327; *Buck v. Dowley*, 16 Gray, 555.

(2) *Metcalf v. Putnam*, 9 Allen, 97; *Glass v. Hulbert*, 102 Mass. 25, 33; *Stockham Iron Co. v. Hudson Iron Co.*, 102 Mass. 45; *Potter v. Jacobs*, 111 Mass. 32.

(3) Power is given by statute to compel "specific performance of contracts in writing," and it is held that, in the face of this provision, the general grant of jurisdiction in all cases of "fraud, trust, accident, and mistake," could not be made to include the specific enforcement of parol contracts which have been part performed. *Wilton v. Harwood*, 23 Me. 131, 134; *Bubier v. Bubier*, 24 Me. 42; *Stearns v. Hubbard*, 8 Greenl. 320.

(4) This course of decision is expressly based upon the statute of frauds; the rules established by the English court of chancery, it is asserted, amount to a virtual repeal of the statute, and let in all the opportunities for frauds and perjuries, which it was the design of that enactment to shut out. When, in such a case, the relief of specific performance is refused, the plaintiff may, however, recover the amount of his payments and outlays for improvements. See *Love v. Neilson*, 1 Jones' Eq. 339; *Barnes v. Teague*, 1 Jones' Eq. 277; *Ellis v. Ellis*, 1 Dev. Eq. 345; *Allen v. Chambers*, 4 Ired. Eq. 125; *Dunn v. Moore*, 3 Ired. Eq. 364; *Albea v. Griffin*, 2 Dev. & Bat. Eq. 9; *Plummer v. Owen*, 1 Busbee Eq. 254; *Barnes v. Brown*, 71 N. C. 507, 511, 512, per RODMAN, J.

(5) *Ridley v. McNairy*, 2 Humph. 174, 177; *Patton v. McClure*, Mart. & Yerg. 333, and in Mississippi, *McGuire v. Stevens*, 42 Miss. 724; *Hairston v. Jaudon*, 42 Miss. 380.

(6) *Worley v. Tuggle*, 4 Bush, 168, 190.

(7) *O'Herlihy v. Hedges*, 1 Sch. & Lef. 123; *Kelly v. Webster*, 12 C. B. 283; *Freeport v. Bartol*, 3 Greenl. 345; *Patterson v. Cunningham*, 2 Fairf. (Me.) 512;

Although its operation has doubtless been beneficial, and the principles and rules upon which it rests are firmly established, yet the courts are careful not to extend it to new circumstances or relations not embraced within those rules and principles. That the statute of frauds is a wise and politic enactment, and accords with the common experience of mankind, is shown by its adoption in nearly all the states, and the tendency at the present day is strongly in favor of sustaining and enforcing its provisions.(1) I shall arrange the further

Norton v. Preston, 15 Me. 14, 16; Lane v. Shackford, 5 N. H. 132; Newell v. Newell, 13 Vt. 24; Pike v. Morey, 32 Vt. 37; Kidder v. Hunt, 1 Pick. 331; Thompson v. Gould, 20 Pick. 138; Adams v. Townsend, 1 Met. 483; Eaton v. Whitaker, 18 Conn. 231; Downey v. Hotchkiss, 2 Day (Conn.) 225; Jackson v. Pierce, 2 Johns. 221, 223; Abbott v. Draper, 4 Denio, 52; Thomas v. Dickenson, 14 Barb. 90; Boutwell v. O'Keefe, 32 Barb. 434; Wentworth v. Buhler, 3 E. D. Smith, 305; Seymour v. Davis, 2 Sandf. 245; Henderson v. Hays, 2 Watts (Pa.) 148; Walter v. Walter, 1 Whart. (Pa.) 292; Barickman v. Kuydendall, 6 Blackf. 22, 24; Sailors v. Gambril, 1 Smith (Ind.) 82; Hunt v. Coe, 15 Iowa, 197; Davis v. Moore, 9 Rich. 215; Payson v. West, 1 Walker (Miss.) 515; Johnson v. Hanson, 6 Ala. 351; Allen v. Booker, 2 Stew. (Ala.) 21; Meredith v. Naish, 4 Stew. & Port. (Ala.) 59.

(1) Phillips v. Edwards, 33 Beav. 440; Phillips v. Thompson, 1 Johns. Ch. 132, 149, per KENT, Ch.: "I agree with those wise and learned judges who have declared that the courts ought to make a stand against any further encroachment on the statute, and not to go one step beyond the rules and precedents already established." German v. Machin, 6 Paige, 289, 293, per WALWORTH, Ch.: "The beneficial provisions of the statute of frauds have been sufficiently broken in upon already, and the doctrine of part performance should not be extended to new cases which do not come clearly within the equitable principles of previous decisions." See, also, Allen's Estate, 1 Watts & Serg. 383, 388; Frye v. Shepler, 7 Barr. 91, 93; Moore v. Small, 7 Harris, 461; Poorman v. Kilgore, 2 Casey, 365; Cox v. Cox, 2 Casey, 375; Wallace v. Brown, 2 Stockt. Ch. 308; Johnston v. Glancey, 4 Blackf. 94, 99; Massey v. McIlwain, 2 Hill, Ch. 421, 426; Hood v. Bowman, 1 Freeman, 290, 294; Anthony v. Leftwich, 3 Rand. 238, 244; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 284, 285; Harnett v. Yielding, 2 Sch. & Lef. 549; Foster v. Hale, 3 Ves. 712, 713, per Lord ALVANLEY; O'Reilly v. Thompson, 2 Cox, 271; Lindsay v. Lynch, 2 Sch. & Lef. 4, 5, 7, per Lord REDESDALE: "The statute was made for the purpose of preventing perjuries and frauds; and nothing can be more manifest to any person who has been in the habit of practicing in courts of equity, than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been rigorously observed, the result would probably have been, that few instances of parol agreements would have occurred. Agreements would, from the necessity of the case, have been reduced to writing. Whereas it is manifest that the decisions on the subject have opened a new door for fraud, and that, under pretence of part execution, if possession is had in any way whatsoever, means are frequently found to put a court of equity in such a situation that, without departing from its rules, it feels itself obliged to break through the statute. It is, therefore, absolutely necessary for courts of equity to make a stand, and not to carry the decisions further." The reported judgments of Lord REDESDALE show that he was strongly opposed to this equitable doctrine.

discussion of the subject in the following order: *First.* The kinds of contracts to which the doctrine of part performance is applied. *Second.* The equitable basis and essential principles of the doctrine. *Third.* The particular acts which do or do not amount to a sufficient part performance. *Fourth.* The nature and effect of the evidence by which the contract must be proved.

SEC. 99. *First. The kinds and classes of contracts to which the doctrine of part performance is applied.*—As the doctrine of part performance exists alone in equity, it is plain that the only agreements to which it can be applied, are those to which equity would grant the remedy of specific execution if they were written. All the conditions upon which the right to the equitable relief is based must be fulfilled, when the agreement is verbal as much as when it is written, for the mere absence of a written memorandum does not of itself let in the equitable jurisdiction; for, otherwise, all contracts might be enforced in equity if they were unwritten. The contract, therefore, must be one for which the legal remedy of damages would be inadequate or impracticable, and for which the equitable remedy of specific execution is possible.(1) It must be obligatory upon the parties, except so far as the absence of a written memorandum prevents its enforcement at law—obligatory, that is, as contradistinguished from a mere honorary engagement;(2) and must be complete and certain in its terms.(3)

SEC. 100. The contracts embraced in certain clauses of the statute of frauds are all purely legal in their nature; the legal remedy of damages is always adequate; and there is no occasion or opportunity either for the equitable relief of specific execution, or the doctrine of part performance. These clauses are: 1, that relating to promises by executors, etc., to answer damages out of their own estates; 2, that relating to promises by one person to answer for the debt, default,

(1) *Kirk v. Bromley Union*, 2 Phil. 640; a contract for work and labor. *Frame v. Dawson*, 14 Ves. 386; *Pembroke v. Thorpe*, 3 Sw. 437; *Eckert v. Eckert*, 3 Penn. 332; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273; *Armstrong v. Kattenhorn*, 11 Ohio, 265.

(2) *Lord Walpole v. Lord Orford*, 3 Ves. 402; *Izard v. Middleton*, 1 Dessau. 116; and for further examples of honorary engagements, see *ante*, § 69.

(3) *Thynne v. Lord Glengall*, 2 H. L. Cas. 158, per Lord Brougham: "Part performance to take a cause out of the statute of frauds always supposes a completed agreement. There can be no part performance when there is no completed agreement in existence. It must be obligatory, and what is done must be under the terms of the agreement and by force of the agreement." *In re Thomas Ryan*, 3 I. R. Eq. 238. The subjects of completeness and certainty are fully treated in subsequent sections of this chapter. The contract must be fair, just, reasonable, mutual, and certain. *Reese v. Reese*, 41 Md. 554.

etc., of another; and 3, similar provisions which are added to the statute in many of the American states. It has already been shown that a contract for the sale or assignment of things in action, and under very special circumstances a contract for the sale or transfer of peculiar chattels, may be specifically enforced in equity. Although the equitable remedy of specific performance may, therefore, be applied to agreements embraced within the clause of the statute relating to the sale of personal property, yet the doctrine of part performance cannot be so applied. The reason is obvious. The only acts which could by possibility be a part performance, payment, or delivery and acceptance, render the contract valid and binding at law; these acts are substituted by the statute in the place of a written memorandum; and all opportunity for resorting to the equitable doctrine of part performance is thus cut off. The clause relating to contracts not to be performed within a year from the making thereof, seems, by its very terms, to prevent any validating effect of part performance upon all agreements embraced within it. As the prohibition relates not to the subject-matter, nor to the nature of the undertaking, but to the *time of the performance itself*, it seems impossible for any part performance to alter the relations of the parties, by rendering the contract one which, by its terms, may be performed within the year. It has, indeed, been held in some cases, that if all the stipulations on the part of the plaintiff are to be performed within a year, an action will lie for a breach of the defendant's promise, although it was not to be performed within the year, and was not in writing. In all these cases, however, the promise of the defendant was simply for the payment of the money consideration, which might, in every instance, have been sued for and recovered upon his implied promise;(1) and the doctrine itself has been expressly and emphatically repudiated by numerous other decisions.(2) But even admitting this rule to its fullest extent, it can only apply to legal actions, and has nothing in common with the equitable doctrine of part performance.(3)

(1) *Bracegirdle v. Heald*, 1 B. & Ald. 727, per ABBOTT, J.; *Donellan v. Read*, 3 B. & Ad. 899; *Cherry v. Heming*, 4 Wels. H. & Gord. 631; *Smith v. Neale*, 2 C. B. 67; *Holbrook v. Armstrong*, 10 Me. 31; *Haugh v. Blythe*, 20 Ind. 24; *Curtis v. Sage*, 35 Ill. 22; *Suggett v. Cason*, 26 Mo. 221; *Talmadge v. Rensselaer & Sar.* R. R., 13 Barb. 493; *Ellicott v. Turner*, 4 Md. 476; *Johnson v. Watson*, 1 Geo. 348; *Rake v. Pope*, 7 Ala. 161.

(2) *Sweet v. Lee*, 3 Man. & Gr. 452; 4 Scott, (N. R.) 77; *Frary v. Sterling*, 99 Mass. 461; *Broadwell v. Getman*, 2 Denio, 87; *Bartlett v. Wheeler*, 44 Barb. 162; *Pierce v. Paine's Estate*, 28 Vt. 34; *Emery v. Smith*, 46 N. H. 151.

(3) There is, perhaps, one exception to this general proposition, arising under the

SEC. 101. The conclusion is thus reached that the doctrine of part performance is confined in its operation to the contracts embraced within the two remaining clauses of the statute of frauds, namely, that relating to the sale of lands, and that relating to agreements made upon the consideration of marriage. Verbal contracts for the sale of lands or of any interest therein may, in general, be part performed, and thus be brought within the jurisdiction of equity and specifically enforced, and in the vast majority of cases which have involved the doctrine, the subject-matter of the agreement was real estate. As the statute speaks of lands, "or any interest in or concerning them," contracts to lease are both included within its terms, and are capable of being part performed so as to be taken out of the operation of the statute and made enforceable in equity.(1) In most of the American statutes all possible doubt upon this point has been removed by adding a clause to the section concerning lands, which expressly includes agreements to lease for a time not exceeding one year. Contracts made upon the consideration of marriage are also capable of partial performance, so as to be taken out of the operation of the statute, if verbal. They may stipulate for the transfer of lands, of chattels, or of things in action; or they may provide for future settlements of real or personal property, in which case their specific performance would consist in the execution of instruments containing the proper covenants and other clauses necessary to carry into effect the intention of the parties. Although, as will hereafter be shown, marriage itself is not a part performance, marriage in connection with other acts may be a sufficient part performance upon which to base the equitable jurisdiction, and decree the enforcement of such agreements whether they deal with real or with personal property.(2) Although, in order to admit

English statutes, and those few of the American states which have exactly copied its language, in the case of agreements to lease for a longer term than one year, which may be covered by the clause in question, and which are certainly capable of being partly performed, and thus brought within the equitable jurisdiction. In the great majority of the American statutes, however, agreements to lease, except for a term not exceeding one year, have been expressly included in the section relating to contracts for the sale of lands, while in New York and some other states it has been held, that such agreements do not come within the provision relating to contracts not to be performed within a year. Practically, therefore, agreements to lease for more than one year are referable to the clause concerning lands, and not to that concerning agreements not to be performed within a year.

(1) *Grant v. Ramsey*, 7 Ohio St. 157.

(2) *Gough v. Crane*, 3 Md. Ch. 119; 4 Md. 316. A verbal agreement that certain things in action—such as bonds, notes, etc., of the wife should become the property of the husband absolutely, had to be sufficiently part performed by a



the doctrine of part performance, the contract must be one which would be specifically enforced by a court of equity if it had been in writing; the converse of this proposition is not true. Every contract which, if written, would be specifically enforced, is not, therefore, necessarily capable of being part performed when verbal, so as to admit the equitable jurisdiction. Part performance, as will be fully shown under the next subdivision, assumes such a change in the relation of the parties that a restoration to their previous condition is impracticable, and a refusal to go on and complete the engagement would be a virtual fraud upon one of the parties. It is plain that there may be agreements even concerning interests in lands, which, by their very terms, are not capable of such a part performance. Wherever part performance is admissible as the basis of equitable interference and relief, it furnishes sufficient ground for enforcing the verbal contracts of corporations equally with those of natural persons.(1)

SEC. 102. *Second. The equitable basis and essential principles of the doctrine.*—In the present subdivision I propose to describe the principal foundation upon which courts of equity have rested the doctrine that a part performance will take a verbal contract out from the operation of the statute of frauds, and the general principles which constitute the essential conditions of the doctrine. The various applications of these principles under different circumstances will be deferred to the next subdivision, which treats of the particular acts which may amount to a sufficient part performance.

SEC. 103. 1. *Fraud the principal foundation.*—It might appear to be a usurpation of legislative power for courts of equity to enforce a verbal contract, proved entirely by parol evidence, in the face of the statute which requires the evidence of a written instrument signed by the party to be charged. In truth, however, there is no attempt or design to repeal the statute. The doctrine of part performance is merely a particular application of the general principle which supports a great part of the equitable jurisdiction; the principle that fraud shall be prevented, relieved against, or punished in whatever form or under whatever guise it may appear. It is simply saying

delivery to the intended husband. *Surcome v. Pinniger*, 3 DeG. M. & G. 571; *Neale v. Neales*, 9 Wall. 1; *Dugan v. Gittings*, 3 Gill. 138; *Hammersly v. De Biel*, 12 Cl. & Fin. 61, 65; *De Beil v. Thomson*, 3 Beav. 475.

(1) *Wilson v. West Hartlepool R'y Co.*, 2 DeG. J. & S. 475; *Crook v. Corporation of Seaford*, L. R. 6 Ch. 551; *Steevens' Hospital v. Dyas*, 15 Ir. Ch. Rep. 405. As to lands owned by partnerships, see *Dale v. Hamilton*, 5 Hare, 369; 2 Ph. 266; *Darby v. Darby*, 3 Drew. 495.

that a man shall not be permitted to use a statute, more than any other assistant, for the purpose of promoting his own fraudulent intents or defending his own fraudulent conduct. If to this principle is joined the equitable conception of fraud, which sees the intent in the nature and consequences of a man's acts as well as in his own mental operations, the doctrine at once arises as a natural and necessary consequence. The grand principle which underlies this, as well as many other instances of equitable jurisdiction, was briefly stated by V. C. SHADWELL: "The author of a mischief is not the party who is to complain of the result of it, but he who has done it must submit to have the effects of it recoil upon himself. \* \* \* Where a wrong has been done, the wrong-doer must suffer from the impossibility of accurately ascertaining the amount of damage." (1) When, for example, a vendor of land, under a parol agreement, knowingly permits the purchaser to take possession, to make payments upon the price, and to expend money in permanent alterations or improvements, and thus to render it impossible for the parties to be restored to their original situation, such vendor cannot complain if a court of equity, not being able to ascertain the exact amount of damage, grants to the purchaser the relief of a specific execution, and thus causes the effects of the wrong to recoil upon its author. The true theory upon which equity has proceeded in applying the doctrine was stated, with his usual accuracy, by Lord WESTBURY in a recent case: "The court of equity has, from a very early period, decided that even an act of parliament shall not be used as an instrument of fraud; and if, in the machinery of perpetrating a fraud, an act of parliament intervenes, the court of equity, it is true, does not set aside the act of parliament, but it fastens on the individual who gets a title (or right) under that act, and imposes upon him a personal obligation, because he applies the act as an instrument for accomplishing a fraud. In this way the court of equity has dealt with the statute of frauds." (2)

SEC. 104. The foundation of the doctrine is fraud; not necessarily an antecedent fraud, consciously intended by the party in making the contract, but a fraud inhering in the consequence of thus setting up the statute. When a verbal contract has been made, and one party has knowingly aided or permitted the other to go on and do acts in part performance of the agreement, acts done in full reliance upon such agreement as a valid and binding contract, and which would not

(1) *Duke of Leeds v. Earl of Amherst*, 20 Beav. 239, 242.

(2) *McCormick v. Grogan*, L. R. 4 H. L. 82, 97, per Lord WESTBURY.

have been done without the agreement, and which are of such a nature as to change the relations of the parties, and to prevent a restoration to their former condition and an adequate compensation for the loss by a legal judgment for damages, then it would be a virtual fraud in the first party to interpose the statute of frauds as a bar to a completion of the contract, and thus to secure for himself all the benefits of the acts already done in part performance, while the other party would not only lose all advantage from the bargain, but would be left without adequate remedy for its failure or compensation for what he had done in pursuance of it. To prevent the success of such a palpable fraud, equity interposes under these circumstances, and compels an entire completion of the contract by decreeing its specific execution. In the cases, which are by far the most frequent, of agreements to purchase and sell lands, it has also been said, in addition to the foregoing reasons, that when the purchaser has gone into possession and made improvements, he would be a trespasser and liable to damage as such, unless the agreement was sustained by reason of its part performance and enforced by equity; and although this ground of the jurisdiction has been severely criticised by able courts, it is clearly tenable as strengthening and sustaining the more general and conclusive argument based upon the principle of fraud.<sup>(1)</sup> The action

(1) *Lester v. Foxcroft*, 1 Colles Par. Cas. 108; *Foxcraft v. Lester*, 2 Vern. 456; *Buckmaster v. Harrop*, 7 Ves. 346, per Sir Wm. GRANT; *Mundy v. Jolliffe*, 5 My. & Cr., 177, per Ld. COTTENHAM; *Bond v. Hopkins*, 1 Sch. & Lef. 433; *Clinan v. Cooke*, 1 Sch. & Lef. 22, 41; *Morphett v. Jones*, 1 Sw. 181; *Att'y Gen. v. Day*, 1 Ves. 221; *Walker v. Walker*, 2 Atk. 100; *Whitbread v. Brockhurst*, 1 Bro. C. C. 417; 2 V. & B. 153, n.; *Hawkins v. Holmes*, 1 P. Wms. 770; *Wills v. Stradling*, 3 Ves. 378; *Meynell v. Surtees*, 3 Sm. & Gif. 101; *Farrall v. Davenport*, 3 Giff. 363; *Caton v. Caton*, L. R. 1 Ch. 137; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 274, 284; *Rathbun v. Rathbun*, 6 Barb. 99, 106; *Meach v. Perry*, 1 Chip. (Vt.) 189; *Tilton v. Tilton*, 9 N. H. 386, 390; *Eyre v. Eyre*, 4 Green Ch. 102; *Gilbert v. The Trustees*, 1 Beas. 180, 204; *Allen's Estate*, 1 Watts & S. 383, 385; *Greenlee v. Greenlee*, 22 Pa. St. 225; *McKee v. Phillips*, 9 Watts, 85, 86; *Moore v. Small*, 19 Pa. St. 461; *Hamilton v. Jones*, 3 Gill & J. 127; *Crane v. Gough*, 3 Md. Ch. 119; *Anthony v. Leftwich*, 3 Rand. 255; *Heth's Ex'r v. Wooldridge's Ex'r*, 6 Rand. 605, 607; *Carlisle v. Fleming*, 1 Harr. 421, 430; *Townsend v. Houston*, 1 Harr. 532, 540; *Church of the Advent v. Farrow*, 7 Rich. Eq. 378; *Anderson v. Chick*, 1 Bailey Eq. 118, 124; *Ford v. Finney*, 35 Ga. 258; *Gilmore v. Johnston*, 14 Ga. 683; *Sites v. Keller*, 6 Hamm. (O.) 483; *Underhill v. Williams*, 7 Blackf. 125; *Hawkins v. Hunt*, 14 Ill. 42; *Farrar v. Patton*, 20 Mo. 81; *Despain v. Carter*, 21 Mo. 331; *White v. Watkins*, 23 Mo. 423; *Chambers v. Lecompte*, 9 Mo. 569; *Feusier v. Sneath*, 3 Nev. 120; *Bond v. Hopkins*, 1 Sch. & Lef. 433, per Lord REDESDALE: "The statute of frauds says that no action or suit shall be maintained on an agreement relating to lands, which is not in writing, signed by the party to be charged with it; and yet the court is in the daily habit of relieving, where the

of the English courts in thus dealing with the statute was, beyond a doubt, facilitated by the peculiar phraseology of its prohibition, which simply shut out a certain kind of evidence, but did not pronounce the contract void. As soon, therefore, as the interdicted species of evi-

party seeking relief has been put into a situation which makes it against conscience in the other party to insist on the want of a writing so signed as a bar to his relief. The first case apparently of the kind was *Foxcraft v. Lester*, cited 2 Vern. 456, and reported in Colles' Parl. Cas. 208. That case was decided on a principle acted upon in courts of law, though not applicable by the mode of proceeding in a court of law to the particular case. It was against conscience to suffer the party who had entered and expended his money on the faith of a parol agreement to be treated as a trespasser, and the other party to enjoy the advantage of the money he had laid out. At law fraud destroys rights. The case of *Foxcraft v. Lester*, therefore, I conceive, was decided on clear principle; though, whether the cases founded on that case have been all so well considered, I will not take upon me to say. But it appears from these cases that courts of equity have decided on equitable grounds in contradiction to the positive enactment of the statute of frauds, though their proceedings are in words included in it." Clinan v. Cooke, 1 Sch. & Lef. 22, 41, per Lord REDESDALE: "I take it that nothing is to be considered as a part performance which does not put the party into a situation that is a fraud upon him, unless the agreement is performed; for instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser if there be no agreement. This is put strongly in the case of *Foxcraft v. Lester*; there the party was let into possession on a parol agreement, and it was said that he ought not to be liable as a wrong-doer, and to account for the rents and profits; and why? because he entered in pursuance of an agreement. Then, for the purpose of defending himself against a charge which might otherwise be made against him, such evidence was admissible; and if it was admissible for such purpose, there is no reason why it should not be admissible throughout; that, I apprehend, is the ground on which courts of equity have proceeded in permitting part performance of an agreement to be a ground for avoiding the statute; and I take it, therefore, that nothing is to be considered as part performance which is not of that nature. Payment of money is not part performance, for it may be repaid, and then the parties would be just as they were before; especially if repaid with interest. It does not put a man who has parted with his money into the situation of a man against whom an action may be brought; for, in the case of *Foxcraft v. Lester*, which first led the way, if the party could not have produced in evidence the parol agreement, he might have been liable in damages to an immense extent." Mundy v. Jolliffe, 5 My. & Cr. 177, per Lord COTTENHAM: "Courts of equity exercise their jurisdiction in decreeing specific performance of verbal agreements where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the statute of frauds, after the other party has, upon the faith of such engagement, expended his money, or otherwise acted in execution of the agreement. Under such circumstances, the court will struggle to prevent such injustice from being effected." Parkhurst v. Van Cortlandt, 1 Johns. Ch. 274 284, per KENT, Ch.: "The ground of the relief in chancery is the fraud in permitting a parol agreement to be partly executed, and in leading on a party to expend money in the

dence was once held admissible, and the terms of the verbal contract thereby proved, in order to shield the purchaser who had been led into possession under it from the liabilities of a trespasser,<sup>1</sup> and of accounting for the rents and profits, there was really nothing in the

melioration of the estate, and then to withdraw from the performance of the contract. The courts of equity, in their anxiety to guard the party from the effects of fraud, have been led to some fluctuating decisions on this point of part performance; but the current of cases, both ancient and modern, is fully uniform and consistent with the principle I have stated, and the tendency of the latter cases is to prefer giving the party compensation in damages instead of a specific performance. Wherever damages will answer the purpose of indemnity, this alternative is to be preferred, as it will equally satisfy justice, and will be in coincidence with the provisions and in support of the authority of the statute." It should be observed that these remarks of Ch. KENT were made in respect to the earlier decisions, and that the principle stated in the text is now thoroughly established, and the line of distinction is clearly drawn between those cases in which the equitable relief of a specific execution will be granted, and those in which the acts of part performance can be sufficiently compensated or indemnified against by an award of damages. The conditions of a part performance were briefly summed up in *Wright v. Pucket*, 22 Gratt, 374: "1. The parol agreement relied on must be certain and definite in its terms. 2. The acts proved in part performance must refer to, result from, or be made in pursuance of, the agreement proved. 3. The agreement must have been so far executed that a refusal of full execution would operate as a fraud upon the party, and place him in a situation which does not lie in compensation. Where these three things concur, a court of equity may decree specific execution. Where they do not, it will turn the party over to seek compensation in damages in a court of law." For a very strong case affirming the rule, that the statute cannot be used to promote a fraud, see *Haigh v. Kaye*, L. R. 7 Ch. 469. The argument in support of the jurisdiction advanced by many of the cases as auxiliary to the main principle of fraud, namely: that a purchaser who takes possession under a parol contract of sale would be liable as a trespasser, unless the agreement should be completely enforced, has been pronounced fallacious and untrue in fact, for the reason that a parol permission for the purchaser to take possession is a license and protects him from liability for his entry, and for all acts done before such license is revoked. See, among other cases, *Glass v. Hulbert*, 102 Mass. 25, per WELLS, J. This criticism itself is unsound, and is based upon an entire misconception of the position which it assails. The argument in question does not deny that a parol license is a protection, nor does it assume that a specific performance is decreed wholly because the purchaser would otherwise be a trespasser. The exact grounds and extent of the position were stated by Lord REDESDALE in the extract above quoted from his judgment in *Clinan v. Cooke*. In order to avail himself of the license to defeat the claim made against him as a trespasser, and for rents and profits, the purchaser must still prove the contract, and thus parol evidence completely establishing the contract must be admitted, notwithstanding the prohibition of the statute; the evidence being once admitted, and the contract proved by parol for this purpose, the court simply gives full effect to that evidence for all purposes. Undoubtedly this reasoning, and the action of the courts, is largely based upon the peculiar language of the statute, which is aimed at the evidence,

statute which forbade the courts to give that evidence its full force and effect, by making it the foundation for a decree of specific performance. When, in several of the American states, the language of the statute was materially altered so as to declare the agreement void, unless written and signed or subscribed, the doctrine of part performance had been too long and too firmly established for the courts to inquire very closely into the intention of the legislators in making the change; this principle has, therefore, continued to be recognized and acted upon, with hardly an exception, in those states as well as in the others, which have preserved the original form of the enactment.(1)

and not at the intrinsic validity of the contract itself. The theory and extent of the doctrine were very clearly stated in *Caton v. Caton*, L. R. 1 Ch. 137, 147, by Ld. Chan. CRANWORTH. After reciting the provision of the statute of frauds, and declaring that it was binding in equity as well as in law, he proceeds: "But though courts of equity have held themselves bound by this last enactment, yet they have in many cases felt themselves at liberty to disregard it, when to insist upon it would be to make it the means of effectuating instead of preventing fraud. This is the ground on which they require specific performance of a parol contract for the sale or purchase of land, when that contract has been in part performed. The right to relief in such cases rests not merely on the contract, but what has been done in pursuance of the contract. \* \* \* The ground on which the court holds that part performance takes a contract out of the provisions of the statute of frauds is, that when one of two contracting parties has been induced or allowed by the other to alter his position on the faith of the contract—as, for instance, by taking possession of land and expending money in building, or other like acts—then it would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced or allowed the person contracting with him to act and expend his money. But such cases bear no resemblance to that now under consideration. \* \* \* I presume it will not be argued that any consequence can be attached to acts of part performance by the party sought to be charged. If I agree with A., without writing, that I will build a house on my land, and then will sell it to him at a stipulated price, and in pursuance of that agreement I build a house, this may afford me ground for compelling A. to complete the purchase, but it certainly would afford no foundation for a claim by A. to compel me to sell on the ground that I had partly performed the contract. The circumstance of the preparation and executing of the will (the acts claimed to be a part performance of an ante-nuptial agreement) *might afford strong evidence of the existence of the parol contract insisted on*, if that were a matter into which we were at liberty to inquire, but it can have no effect in giving validity to an otherwise invalid contract." See, also, *Semmes v. Worthington*, 38 Md. 298; *Morgan v. Bergen*, 3 Neb. 203; *Horn v. Ludington*, 32 Wisc. 73; *Pierce v. Catron*, 23 Gratt. 588.

(1) The change in the language of the statute, although radical and apparently fraught with the gravest consequences in its construction, does not seem to have produced any material results, or to have made the act anything more than a rule of evidence; a remarkable example of judicial power in controlling, or even thwarting, the intent of legislatures.

SEC. 105. From the fundamental principle above stated, several subordinate rules are deduced as necessary corollaries. In the first place, the acts of part performance must be done by the party seeking to enforce the contract—that is, in most instances, by the plaintiff. If the acts, in pursuance of the agreement, have been done alone by the party who is to be charged, his ceasing and refusing to complete cannot be a fraud upon the other party requiring the interposition of equity, for the other party has done nothing, or suffered nothing to change his own original position. Such acts, at most, merely prove the existence of an agreement; but equity does not profess to enforce a verbal agreement simply because it has been satisfactorily established.(1) For example, payment of the purchase-money by the vendee is not a ground for a specific performance at the suit of the vendor.(2) And acts done by persons not parties to the contract, and not agents or representatives of the plaintiff, cannot amount to a part performance; as, for example, in a parol agreement to divide lands by means of arbitrators, their acts, done under the bargain and in partial execution thereof, do not take the case out of the statute.(3) Again, as fraud will be relieved against, under all circumstances and by whomsoever committed, the doctrine of part performance is applied to corporations equally with natural persons; and is made the ground for enforcing their parol agreements, although by the common-law rule, which still prevails in England, they cannot generally contract except by means of their corporate seal.(4) As this dogma of the ancient law has been abandoned in the United States, no doubt can arise as to the power to enforce the verbal agreements of corporations; their capacity to contract, within the domain of their corporate functions—that is, their capacity to contract so far as the external forms and methods are concerned—is the same as that of individuals.(5)

(1) *Caton v. Caton*, L. R. 1 Ch. 137; *Buckmaster v. Harrop*, 7 Ves. 341, per Sir WM. GRANT; *Rathbun v. Rathbun*, 6 Barb. 98; *Suckett v. Williamson*, 37 Mo. 388; but see *Lowe v. Bryant*, 30 Geo. 528; *Whitredge v. Parkhurst*, 20 Md. 62.

(2) *Buckmaster v. Harrop*, 7 Ves. 341; 13 Ves. 456. His refusing to go on and complete after such payment “would be no fraud upon the seller, but his own loss.”

(3) *Cooth v. Jackson*, 6 Ves. 12.

(4) *London & Birmingham R’y Co. v. Winter*, Cr. & Ph. 57; *Earl of Lindsey v. Great Northern R’y Co.*, 10 Ha. 664, 700; *Wilson v. West Hartlepool R’y Co.*, 2 DeG. J. & S. 475; *Crook v. Corporation of Seaford*, L. R. 6 Ch. 551; *Steeven’s Hospital v. Dyas*, 15 Ir. Ch. Rep. 405.

(5) Ang. & Ames on Corporations, §§ 219, 237-241; *Dillon on Munic. Corp’ns*.

SEC. 106. In every case where the doctrine of part performance has been applied, the elements of a constructive fraud will be found to exist, and in the absence of these elements equity always refuses to interfere. There must be acts of such a nature that the plaintiff cannot be replaced in his original position or adequately compensated by damages; and there must be the knowledge on the part of the defendant, which is an essential ingredient of every fraud either actual or constructive. Acts may, therefore, be done by the plaintiff in pursuance of the contract, in reliance upon it, and which would not have been done without it, but which, nevertheless, will not entitle him to a decree of specific performance, because he may be restored to his former condition and his loss made up by a legal remedy; so that the ultimate non-performance of the agreement does not constitute the hardship or imposition upon him which equity requires as the occasion of its interference.(1) For this reason payment of the price by the purchaser is not by itself a sufficient part performance, since he can recover it back at law.(2) Upon the same principle, if possession or improvements are taken or made, or other acts are done against the vendor's consent or even without his knowledge, they would lack an essential element for the imputation of fraud, and would not be a ground for enforcing the agreement.(3) To constitute a fraud the knowledge and the conduct which is inconsistent and unfair with reference to it, must unite in one and the same individual. If, therefore, an agreement is made by one person, acts of part performance by the plaintiff which would avail against him, may be entirely without effect where the contract is sought to be enforced against another person between whom and the original party there is no privity or representative relation. If in England an agreement made with a tenant for life is enforced against the remainder man, the plaintiff's part performance will not entitle him to the relief, unless he can prove that the defendant, the remainder man, knew of the

(1) *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 274, 284; *Tilton v. Tilton*, 9 N. H. 386, 390; *Gilbert v. Trustees, etc.*, 1 Beasley, 179, 204; *White v. Watkins*, 23 Mo. 423; *Chambers v. Lecompte*, 9 Mo. 569; *Hawkins v. Hunt*, 14 Ill. 42; *Crane v. Gough*, 3 Md. Ch. 119; *Allen's Estate*, 1 Watts & Serg. 383, 385; *McKee v. Phillips*, 9 Watts, 85, 86.

(2) *Clinan v. Cooke*, 1 Sch. & Lef. 22, 40, per Lord REDESDALE; *Hughes v. Morris*, 2 DeG. M. & G. 356; *Eaton v. Whitaker*, 18 Conn. 222, 229; *Rhodes v. Rhodes*, 3 Sandf. 279, 284; *Ham v. Goodrich*, 33 N. H. 32, 39; *Glass v. Hulbert*, 102 Mass. 24.

(3) *Lord v. Underdunck*, 1 Sandf. 46, 48; *Jervis v. Smith*, Hoff. 470, 475; *Thompson v. Scott*, 1 McCord, 32, 39.



contract and permitted the acts done in pursuance of it.(1) This, therefore, is the principle by which every case is to be determined, by which every difficulty is to be resolved; if the refusal to complete the verbal contract which has been partly performed, would, within the established doctrines of equity, operate as a fraud upon the party who has done the acts, then a court of equity will compel the wrongdoer to bear the results of his bad faith, and will not suffer him to use the statute of frauds as a cover for his unjust and inequitable conduct.(2)

SEC. 107. 2. *Nature of the acts with reference to the agreement.*—*The acts of part performance must be done in pursuance of the agreement alleged, and with the design of carrying the same into complete execution.*(3) —It is important here to obtain an accurate notion concerning the facts which the acts of part performance must show to exist, in order that they may be a sufficient ground for the interference of equity, especially as there are misleading dicta and even erroneous decisions upon this particular point. In a suit to enforce the specific performance of a verbal contract embraced within the statute of frauds, two distinct facts are established by parol evidence—the acts of part performance, and the terms of the agreement itself. According to the theory upon which equity proceeds, in such cases, the part performance must be first proved, in order to fulfill the condition precedent for letting in parol evidence of the agreement; and this is not a mere

(1) *Shannon v. Bradstreet*, 1 Sch. & Lef. 72; *Morgan v. Milman*, 3 DeG. M. & G. 33, per Lord CRANWORTH; *Blore v. Sutton*, 3 Mer. 237; *Whitbread v. Brockhurst*, 1 Bro. C. C. 404. The relations of remainder men to the life tenants have been so radically changed by statute in the American states, that this question could hardly arise in this country.

(2) It has been suggested in a recent case and by a very able equity judge (*Morgan v. Milman*, 3 DeG. M. & G. 35, per Lord CRANWORTH), that where the acts done by the plaintiff admit of two remedies in the alternative, the one a specific execution of the agreement in equity, and the other a special proceeding to accomplish the same general purpose given by statute, such acts could not, under the circumstances, constitute a part performance, since the refusal of the defendant to complete could not be considered a fraud upon the plaintiff when he is at liberty to avail himself of the other special remedy. This conclusion, of course, assumes that the alternative remedy is something more than the ordinary legal relief of damages, and is something in fact tantamount to a specific performance. The opinion, moreover, is only a *dictum*, and its correctness is doubtful; for, in general, a new remedy, given by statute, does not displace the prior existing remedies at law or in equity. See Sedgwick on Statutory Law (2d ed.), pp. 75, 76.

(3) "The acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved." *Wright v. Pucket*, 22 Gratt. 374.

question of the order of proofs—it involves the very principle of the jurisdiction. As soon as a sufficient part performance is made out, the plaintiff may go on and show the terms of the verbal contract. There are, therefore, two distinct branches of parol evidence, with a distinct fact to be established by each, but proceeding in a fixed order of time, and of antecedent and consequent; not, however, exactly in the order of cause and effect. Now, the question before us is, What must be proved by the first branch of this parol evidence, in order to open the way for the second? In the vast majority of cases the evidence establishing the part performance, and the acts of part performance themselves, when established, do not and, in the nature of things, cannot fully show what are the terms of the agreement alleged and relied upon by the plaintiff, nor are they introduced for any such purpose. The judicial opinions which, in unguarded and careless language, would require the acts of part performance to prove the exact contract as alleged, are in this respect clearly erroneous. The true rule is, that the acts of part performance must be such as show that some contract exists between the parties; that they were done in pursuance thereof, and that it is not inconsistent with the one alleged in the pleading. Whenever acts of part performance are made out, which thus point to a contract, the door is opened, and the plaintiff may introduce additional parol evidence directed immediately to the terms of *the* contract relied upon.(1)

(1) There are some cases which lay down the rule that the acts of part performance must clearly prove the contract as alleged; must do more than show the existence of *some* contract, by being of themselves evidence of the very contract which the plaintiff seeks to enforce. See *Phillips v. Thompson*, 1 Johns. Ch. 131; *Chesapeake, etc., Canal Co. v. Young*, 3 Md. 480; *Beard v. Linthicum*, 1 Md. Ch. 345; *Goodhue v. Barnwell*, Rice Eq. (S. C.) 198; *Grant v. Craigmile*, 1 Bibb. 203. In *Lindsay v. Lynch*, 2 Sch. & Lef. 1, 8, Lord REDESADLE is reported to have said, that the acts of part performance must be such as show them to have been done in pursuance of the very same agreement as that alleged by the plaintiff. These American decisions may have resulted from a misunderstanding or misapplication of the language used by Sir WILLIAM GRANT in *Frame v. Dawson*, 14 Ves. 386, that the part performance must be “an act unequivocally referring to and resulting from the agreement;” by giving an undue force to the article “the;” “*the* agreement.” If this were the true rule, then the whole doctrine of enforcing a verbal contract which has been part performed, would rest upon a most vicious reasoning in a circle, since the acts of part performance would be relied on to prove the agreement, while their character *as* acts of part performance would at the same time be proved by the agreement. The correct rule, as given above in the text, is admirably stated in the following quotation from the judgment of SHADWELL, V. C., in *Dale v. Hamilton*, 5 Ha. 369: “It is generally of the essence of such an act (of part performance) that the court shall, by reason

SEC. 108: With this explanation of their probative effect, the acts of part performance must be done in pursuance of the agreement; must unequivocally refer to and result from the agreement; or, in other words, clearly showing that there exists some contract between the parties, they must be exclusively referable thereto; it must appear that they would not have been done except on account thereof, and they must be consistent with the contract alleged. When parol evidence has been admitted to prove the agreement in suit, the acts of part performance must be clearly and exclusively referable to and in pursuance of its terms. Undoubtedly much of the general language found in the cases is intended to describe the necessary correspondence between the acts of part performance and the agreement alleged, after it has thus been established by the evidence directly introduced for that purpose.(1) The theory upon which equity proceeds in this

of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract. Of this a common example is the delivery of possession. One man, without being amenable to the charge of trespass, is found in the possession of another man's land. Such a state of things is considered as showing unequivocally that *some* contract has taken place between the litigant parties; and it has, therefore, on that specific ground, been admitted to be an act of part performance. But an act which, though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not, in general, admitted to constitute a part performance to take the case out of the statute of frauds; as, for example, the payment of a sum of money alleged to be purchase-money." See, also, *Allan v. Bower*, 3 Bro. C. C. 149; *Frame v. Dawson*, 14 Ves. 383; *Morphett v. Jones*, 1 Sw. 172; *Savage v. Carroll*, 1 Ball & B. 265; *Toole v. Medicott*, 1 Ball & B. 393; *Sutherland v. Briggs*, 1 Ha. 27; *Tomkinson v. Staight*, 17 C. B. 697, 707, per *WILLIAMS, J.*; *Parkhurst v. Van Cortlandt*, 14 Johns. 15; *Harris v. Knickerbacker*, 5 Wend. 633; *Jones v. Peterman*, 3 Serg. & R. 543; *Church v. Sterling*, 16 Conn. 402.

(1) *Lacon v. Mertins*, 3 Atk. 3, 4, per Lord HARDWICKE: "It must be such an act done as appears to the court would not have been done except on account of the agreement." *Frame v. Dawson*, 14 Ves. 386, per Sir WILLIAM GRANT: "It must be an act unequivocally referring to and resulting from the agreement." *Cooth v. Jackson*, 6 Ves. 12; *Buckmaster v. Harrop*, 7 Ves. 341; *Morphett v. Jones*, 1 Sw. 172; *O'Reilly v. Thompson*, 2 Cox, 271; *Parker v. Smith*, 1 Coll. C. C. 624; *Lindsay v. Lynch*, 2 Sch. & Lef. 1; *Brennan v. Bolton*, 2 Dru. & Wal. 349; *Wills v. Stradling*, 3 Ves. 378; *Meynell v. Surtees*, 3 Sm. & Giff. 101; *Phillips v. Thompson*, 1 Johns. Ch. 131, 149; *Rathbun v. Rathbun*, 6 Barb. 98; *Jervis v. Smith*, Hoff. Ch. 470; *Ham v. Goodrich*, 33 N. H. 32; *North v. Forest*, 15 Conn. 400; *Osborn v. Phelps*, 19 Conn. 74, 75; *Peckham v. Barber*, 8 R. I. 17; *Cole v. Potts*, 2 Stockt. 67; *Robertson v. Robertson*, 9 Watts, 32, 42; *Moore v. Small*, 7 Harris (19 Pa. St.), 461; *Cox v. Cox*, 2 Casey, 375; *Eckert v. Eckert*, 3 Penn. 332; *Frye v. Shepler*, 7 Barr. 91; *Duvall v. Myers*, 2 Md. Ch. 401; *Moale v. Buchanan*, 11 Gill & J. 314; *Chesapeake & Ohio Canal Co. v. Young*, 3 Md. 480; *Mundorff*

branch of its jurisdiction is well established, and if rightly understood, it will harmonize all the cases and remove all occasion of doubt or confusion. A plaintiff cannot, in the face of the statute, prove a verbal contract by parol evidence, and then show that it has been partly performed. This course of proceeding would be a virtual repeal of the statute. He must first prove acts done by himself, or on his behalf, which point unmistakably to a contract between himself and the defendant, which cannot, in the ordinary course of human conduct, be accounted for in any other manner than as having been done in pursuance of a contract, and which would not have been done without an existing contract; and although these acts of part performance cannot, *of themselves*, indicate all the terms of the agreement sought to be enforced, they must be consistent with it, and in conformity with its provisions when these shall have been shown by the subsequent parol evidence. It follows, from this invariable rule, that acts which do not unmistakably point to a contract existing between the parties or which can be reasonably accounted for in

*v. Howard*, 4 Md. 459; *Shepherd v. Shepherd*, 1 Md. Ch. 244; *Owings v. Baldwin*, 8 Gill, 337; *Shepherd v. Bexin*, 9 Gill, 32; *Hamilton v. Jones*, 3 Gill & J. 127; *Gough v. Crane*, 3 Md. Ch. 132; *Hall v. Hall*, 2 McCord Ch. 274; *Smith v. Smith*, 1 Rich. Eq. 130, 133; *Hatcher v. Hatcher*, 1 McMullan Eq. 311, 318; *Davis v. Moore*, 9 Rich. 215; *Anthony v. Leftwich*, 3 Rand. 238, 247, 277; *White v. Watkins*, 23 Mo. 423, 428; *Phillips v. Thompson*, 1 Johns. Ch. 131, 149, per Chan. KENT: "It is well settled that if a party sets up part performance to take a parol agreement out of the statute, he must show acts unequivocally referring to and resulting from *that* agreement; such as the party would not have done unless on account of that very agreement and with a direct view to its performance; and the agreement set up must appear to be the *same* with the one partly performed. There must be no equivocation or uncertainty in the case. The ground of the interference of the court is not simply that there is proof of the existence of a parol agreement, but that there is *fraud* in resisting the completion of an agreement partly performed." These remarks, if intended to describe the relation between the part performance and the contract alleged, after the terms of the latter have been fully disclosed by the parol evidence, are accurate and clear; if they are intended to describe the effect which must be produced by the evidence which is given simply to prove the acts of part performance, without reference to any further evidence directed expressly to the agreement, they are too strong and in fact require an impossibility. Also, *Anderson v. Chick*, 1 Bailey Eq. 118, 124; *Hood v. Bowman*, Freeman Ch. 290, 293; *Stoddert v. Tuck*, 4 Md. Ch. 475; 5 Md. 18; *Wolfe v. Frost*, 4 Sandf. Ch. 72; *Reese v. Reese*, 41 Md. 554; *Lester v. Kinne*, 37 Conn. 9; *Semmes v. Worthington*, 38 Md. 298; *Morgan v. Bergen*, 3 Neb. 209; *Horn v. Ludington*, 32 Wisc. 73; *Pierce v. Catron*, 23 Gratt. 588; *Billingslea v. Ward*, 33 Md. 48; *Knoll v. Harvey*, 19 Wisc. 99. And it has been said that the part performance must give a mutual right to enforce the contract. *Smith v. McVeigh*, 3 Stockt. 239. But this cannot easily be reconciled with the rule given *ante* in § 105

some other manner than as having been done in pursuance of such a contract, do not constitute a part performance sufficient in any case to take it out of the operation of the statute, even though a verbal agreement has actually been made between the parties. It is for this reason, among others, that payment of the purchase-price, in whole or in part, is not of itself a sufficient performance to obviate the statute, because the mere payment of money by one man to another does not, in the ordinary course of human conduct, indicate the existence of a contract between them; the fact of such payment is reasonably explicable in many other ways than as having been done in pursuance of a contract.(1) For a like reason, the mere possession of the premises by a tenant continued after the expiration of his term, is not a sufficient part performance of a verbal contract to renew the lease or to convey the land, because such possession may be as reasonably and naturally explained by his holding over as by an agreement to renew or to convey; in other words, it does not unequivocally point to the existence of a contract between the parties, but is referable to another cause.(2) The rule is general in its application and fundamental in principle, that acts which are referable to something else than the verbal agreement, and which may be ordinarily otherwise accounted for, do not constitute a sufficient part performance of it.(3)

(1) *Dale v. Hamilton*, 5 Ha. 369, per SHADWELL, V. C.; *Buckmaster v. Harrop*, 7 Ves. 341; *Coles v. Trecothick*, 9 Ves. 234; *Allen's Estate*, 1 Watts & S. 383; *Kidder v. Barr*, 35 N. H. 235; *Underhill v. Allen*, 18 Ark. 466; *Hart v. McClellan*, 41 Ala. 251; *Hyde v. Cooper*, 13 Rich. Eq. 250.

(2) *Wills v. Stradling*, 3 Ves. 381, per Lord LOUGHBOROUGH, Ch.: "As to the possession in the case of a tenant, who of course continues in possession, unless he has notice to quit, the mere fact of his continuance in possession would not weigh. The *delivery* of possession by a person having possession to the person claiming under an agreement is a strong and marked circumstance; but the mere *holding over* by the tenant, which he will do, of course, if he has no notice to quit, would not of itself take the case out of the statute, or even call for an answer." *Morphett v. Jones*, 1 Sw. 181; *Johnston v. Glancy*, 4 Blackf. 94, 99; *Anthony v. Leftwich*, 3 Rand. 238, 256; *Cole v. Potts*, 2 Stockt. 67; *Workman v. Guthrie*, 5 Casey, 495, 572.

(3) *Duvall v. Myers*, 2 Md. Ch. 401. For example, where a tenant during the continuance of his term makes improvements, these will not be taken as part performance of a verbal contract to sell and purchase the premises between himself and the lessor, because they are as naturally referable to his right and interest under the lease. *West v. Flannagan*, 4 Md. 36. And acts which a tenant was bound or permitted to do under his lease, cannot be a sufficient part performance of a parol agreement to renew. *Bryne v. Romaine*, 2 Edw. Ch. 445, 446. Where the owners of adjacent lots verbally agreed that each would build on the same line at a certain distance back from the street, and one of them erected his building

SEC. 109. Finally, the acts of part performance must not only be done in pursuance of the agreement—that is, must be accounted for only on the supposition of its existence, but they must also be done in execution of the contract alleged, and for the purpose, so far as they go, of carrying it into effect. If a plaintiff should, relying upon a verbal agreement, and with the defendant's knowledge, do something prejudicial to himself in a manner and to an extent not susceptible of compensation in damages, but unconnected with that agreement and not in execution of its provisions, this would fall far short of being the part performance required by the rule, in order to admit the remedial jurisdiction of equity.<sup>(1)</sup> This requirement is often confounded, by the cases and by text writers, with the one last discussed; but there is a plain and wide difference between acts done in pursuance of an agreement—that is, because of it, relying upon it, accounted for by its existence, and acts done in execution of it. All acts done in execution of a contract are, of course, done in pursuance of it; but the converse of this proposition is by no means true. We are now prepared to apply these general principles by determining what particular acts do or do not constitute a part performance.

SEC. 110. *Third. The particular acts which do or do not amount to a sufficient part performance.*—In the discussion of this section I shall briefly enumerate those species of acts which, it is well settled, do not

upon the line, this act was held not to constitute a part performance of the contract, since it might as well have been done without an agreement, and did not, therefore, unequivocally point to the existence of any agreement between the parties. *Wolfe v. Frost*, 4 Sandf. Ch. 72; and see *Brennan v. Bolton*, 2 Dr. & W. 349; *Frame v. Dawson*, 14 Ves. 333; *German v. Machin*, 6 Paige, 289, 293.

(1) Most of the cases cited under the last paragraph, § 108, are also authority for this rule. *Gunter v. Halsey*, Ambl. 586; *Buckmaster v. Harrop*, 7 Ves. 341; *Morphett v. Jones*, 1 Sw. 181; *Whitbread v. Brockhurst*, 1 Bro. C. C. 417; 2 V. & B. 154, n.; *Meynell v. Surtees*, 3 Sm. & Giff. 101; *Farrall v. Davenport*, 3 Giff. 363; *Frame v. Dawson*, 14 Ves. 383; *Brennan v. Bolton*, 2 Dr. & W. 349; *Crocker v. Higgins*, 7 Conn. 342; *Harris v. Knickerbacker*, 5 Wend. 638; *Jervis v. Smith*, 1 Hoff. Ch. 470; *Lord v. Underdunk*, 1 Sandf. Ch. 46; *Smith v. Underdunk*, 1 Sandf. Ch. 579; *Byrne v. Romaine*, 2 Edw. Ch. 445; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Peckham v. Barker*, 8 R. I. 17; *Davis v. Moore*, 9 Rich. 215; *Hatcher v. Hatcher*, 1 McMullan Eq. 311, 318; *Robertson v. Robertson*, 9 Watts, 32, 42; *Anthony v. Leftwich*, 3 Rand. 238, 247, 277; *Moore v. Small*, 7 Harris, 461; *Cox v. Cox*, 2 Casey, 375; *Stoddert v. Tuck*, 4 Md. Ch. 475; 5 Md. 18; *Anderson v. Chick*, 1 Bailey Eq. 118, 124; *German v. Machin*, 6 Paige, 289, 293; *Ham v. Goodrich*, 33 N. H. 32; *Chesapeake and Ohio Canal v. Young*, 3 Md. 480; *Mundorf v. Howard*, 4 Md. 459; *Lester v. Kinne*, 37 Conn. 9; *Gough v. Crane*, 3 Md. Ch. 132; *Duvall v. Myers*, 2 Md. Ch. 401; *White v. Watkins*, 23 Mo. 423, 428.

constitute a part performance, and dwell with more detail upon those which do or may suffice to take a case from out the operation of the statute.

1. Acts done prior to the contract, since they are neither in pursuance nor in execution of it, are never a part performance upon which to base a specific enforcement of the agreement by a court of equity ;(1) and, therefore, possession taken when the negotiation between the parties began and in anticipation of rights which might accrue from an expected contract, is held to be unavailing as an act of part performance.(2)

2. Acts merely preparatory, introductory, or ancillary to the agreement, are not a part performance, for two reasons. 1. These acts, although they may be subsequent to the agreement, and in consequence thereof are not, from their very nature, done in execution of it, or for the direct purpose of carrying it into effect. 2. Such acts are generally performed by one party without the other's knowledge ; they do not so change the plaintiff's condition that a refusal to complete would work a virtual fraud upon him, and they do not unequivocally point to a completed contract between the parties, but only indicate, at most, the pendency of a negotiation or treaty between them. It is fully established, under this rule, that the following and other analogous acts by or on behalf of the plaintiff are not a part performance to take a verbal contract out from the operation of the statute ; delivering abstracts of title ; giving instructions for a lease ; giving orders for the drawing of conveyances and putting title deeds into an attorney's hands for that purpose ; the taking notes and preparing a conveyance by an attorney ; visiting and examining the land in question ; measuring the land ; employing surveyors to value the timber on the land ; appointing appraisers to value the land or to value stock ; valuations actually made ; drawing up, executing, and recording deeds of conveyance by the vendor which had not been accepted by the purchaser.(3) The same rule has been applied to

(1) *Parker v. Smith*, 1 Coll. C. C. 608, 623.

(2) *Dougan v. Blocker*, 12 Harris, 28 ; *Eckert v. Eckert*, 3 Penn. 332.

(3) *Cole v. White*, cited 1 Bro. C. C. 409 ; *Whitbread v. Brockhurst*, 1 Bro. C. C. 412 ; *Whitchurch v. Bevis*, 2 Bro. C. C. 559 ; *Reidling v. Wilkes*, 3 Bro. C. C. 400 ; *Clerk v. Wright*, 1 Atk. 12 ; *Hawkins v. Holmes*, 1 P. Wms. 770 ; *Pembroke v. Thorpe*, 3 Sw. 437, n. ; *Cooke v. Tombs*, 2 Anst. 420 ; *Montacute v. Maxwell*, Stra. 236 ; *Popham v. Eyre*, Lofft. 786 ; *Cooth v. Jackson*, 6 Ves. 12, 17, 41 ; *Frame v. Dawson*, 14 Ves. 386 ; *Stokes v. Moore*, 1 Cox, 219 ; *Earl of Glengall v. Barnard*, 1 Keen, 769 ; *Thynne v. Earl of Glengall*, 2 Cl. & Fin. (N. S.), 131 ; *Phillips v.*

other cases in which the acts, though not resembling those described in foregoing list, were held to be merely preparatory, and not done in execution of the verbal contract sought to be enforced. Thus, an appropriation of money made for the purpose of carrying out the intended purchase by the plaintiff, is not a part performance of a verbal contract of sale;(1) and defendant having verbally agreed to convey land to the plaintiff when the latter should obtain a release of a right from a third person, the plaintiff procured the release by the payment of a large sum in consideration therefor, but this act was held to be merely preparatory to the agreement, and not in part performance;(2) and where the purchaser, in a verbal contract for the sale of land, had bound himself to lease the premises to a third person, his making the lease does not constitute a part performance.(3)

SEC. 111. 3. When a verbal contract is made in relation to or upon the consideration of marriage, the marriage alone is not a part performance upon which to decree a specific execution. This rule, which is firmly established, is based upon the express language of the statute. A promise made in anticipation of a marriage, followed by the marriage, is the exact case contemplated by the statute. It is plain that the marriage adds nothing to the very circumstances described by the statutory provision which makes a writing essential; in fact, until the marriage takes place, there is no binding agreement independent of the statute, so that the marriage itself is a necessary part of every agreement made upon consideration of it, which the legislature has said must be in writing.(4) In a very few of the states this clause is entirely omitted from the statute of frauds, and of course the rules derived from its interpretation do not prevail therein.(5) The cases

Edwards, 33 Beav. 440; Gratz v. Gratz, 4 Rawle, 411; Reeves v. Pye, 1 Cranch, C. C. 219; Givens v. Calder, 2 Dessau. Ch. 171; Smith v. Smith, 1 Rich. Eq. 130, 138.

(1) East India Company v. Nuthumbadoo Veerasawmy Moodelly, 7 Moo. P. C. C. 482.

(2) O'Reilly v. Thompson, 2 Cox, 271.

(3) Whitchurch v. Bevis, 2 Bro. C. C. 559, and see Whaley v. Bagnel, 1 Bro. P. C. 345; compare these cases with Parker v. Smith, 1 Coll. C. C. 608.

(4) Taylor v. Beech, 1 Ves. Sen. 297, per Lord HARDWICKE; Dundas v. Dutens, 1 Ves. 199; 2 Cox, 235, per Lord THURLOW; Lassence v. Tierney, 1 McN. & G. 551; Warden v. Jones, 23 Beav. 497; 2 DeG. & Jo. 76; Cooper v. Warrnold, 7 W. R. 402; Caton v. Caton, L. R. 1 Ch. 137; L. R. 2 H. L. 127; McAskie v. McCay, 2 I. R. Eq. 447; Montacute v. Maxwell, 1 P. Wms. 618; Redding v. Wilkes, 3 Bro. C. C. 400, 401; Finch v. Finch, 10 Ohio St. 501.

(5) See *ante*, § 70.



where other acts in connection with marriage may be sufficient to render the contract enforceable, are postponed to a subsequent paragraph.(1)

SEC. 112. 4. Payment of the purchase-price, either in whole or in part, is not an act of part performance within the foregoing principles, and does not take a verbal contract out from the operation of the statute.(2) The statute of frauds of Iowa, however, in express terms, declares that the acceptance of the purchase-price, or a part thereof, by a vendor of land, shall make a verbal contract of sale binding—shall in effect be equivalent to a written memorandum.(3) In the earliest cases it was held, that the payment of a considerable portion of the purchase-price would take a verbal contract for the sale of land out from the operation of the statute, while the payment of a small portion would not have that effect;(4) but this distinction was long ago rejected as being based upon no sound principle.(5)

(1) See *post*, § 133.

(2) *Clinan v. Cooke*, 1 Sch. & Lef. 40; *O'Herlihy v. Hedges*, 1 Sch. & Lef. 123; *Hughes v. Morris*, 2 DeG. M. & G. 356; *Leak v. Morrice*, 2 Ch. Cas. 135; *Alsopp v. Patten*, 1 Vern. 472; *Lord Pengall v. Ross*, 2 Eq. Cas. Abr. 46, pl. 12; *Seagood v. Meale*, Prec. Ch. 560; *Buckmaster v. Harrop*, 7 Ves. 341; *Coles v. Trecothick*, 9 Ves. 234; *Frame v. Dawson*, 14 Ves. 388; *Ham v. Goodrich*, 33 N. H. 32, 39; *Kidder v. Barr*, 35 N. H. 235; *Underhill v. Allen*, 18 Ark. 466; *Thompson v. Gould*, 20 Pick. 134; *Glass v. Hulburt*, 102 Mass. 24; *Eaton v. Whitaker*, 18 Conn. 222, 229; *Cole v. Potts*, 2 Stockt. 67; *Allen's Estate*, 1 Watts & Serg. 383, 389; *McKee v. Phillips*, 9 Watts, 85; *Parker v. Wells*, 6 Whart. 153, 161; *Gangwer v. Fry*, 17 Pa. St. 491; *Rankin v. Simpson*, 7 Harris, 471; *Jackson v. Cutright*, 5 Munf. 308; *Hyde v. Cooper*, 13 So. Car. Eq. 250; *Anderson v. Chick*, Bailey Eq. 118; *Church of the Advent v. Farrow*, 7 Rich. Eq. 378; *Givens v. Calder*, 2 Dessau. Ch. 174; *Smith v. Smith*, 1 Rich. Eq. 130, 132, 135; *Finucane v. Kearney*, 1 Freem. Ch. 65, 68; *Hood v. Bowman*, 1 Freem. Ch. 290, 294; *Black v. Black*, 15 Geo. 445; *Mialhi v. Lassabe*, 4 Ala. 712; *Hart v. McClellan*, 41 Ala. 251; *Garner v. Stubblefield*, 5 Tex. 561; *Wood v. Jones*, 35 Tex. 64; *Wilber v. Paine*, 1 Hamm. (Ohio) 252; *Sites v. Keller*, 6 Hamm. (Ohio) 528; *Letcher v. Cosby*, 2 A. K. Marsh. 106; *Johnston v. Glancy*, 4 Blackf. 94; *Parke v. Leewright*, 20 Mo. 85; *Purcell v. Miner*, 4 Wall. 513; *Thompson v. Tod*, Pet. C. C. 380; *Cronk v. Trumble*, 66 Ill. 428; *Wood v. Jones*, 35 Tex. 64; *Lanz v. McLaughlin*, 14 Minn. 72; *Cuppy v. Hixon*, 29 Ind. 522.

(3) See *ante*, § 96. *Fairbrother v. Shaw*, 4 Iowa, 570.

(4) *Lacon v. Mertins*, 3 Atk. 4 per Lord HARDWICKE, who held generally that part payment was a good part performance. *Child v. Comber*, 3 Sw. 423, n.; *Owen v. Davies*, 1 Ves. Sen. 82; *Hales v. Van Berchem*, 2 Vern. 618; *Skett v. Whitmore*, Freem. Ch. 281; *Main v. Melbourn*, 4 Ves. 720, 724, per Lord ROSLYN, who held as stated in the text. *Wetmore v. White*, 2 Caine's Cas. 87, 109; *Townsend v. Houston*, 1 Harring. 532, 541; *Jones v. Peterman*, 3 Serg. & R. 543; *Frieze v. Glenn*, 2 Md. Chr 361; *Harwood v. Jones*, 10 Gill & J. 404.

(5) See cases cited above in the first note under § 112.

SEC. 113. Before considering any special applications of this rule, or exceptions to it, the grounds upon which it rests must be stated and briefly explained. Three different reasons for it have been advanced by the cases. The first is drawn entirely from the language of the statute. Since the clause concerning the sale of goods and chattels expressly provides that the receipt of the price, or a part thereof, shall render a verbal contract binding, it is argued that, by omitting any similar provision from the section relating to lands, the legislature has clearly indicated its intent, that such a payment shall not avail in the case of a verbal contract for the sale of real estate. This explanation of the doctrine was first made by Lord REDESDALE, and has been accepted as satisfactory by some other judges.<sup>(1)</sup> The second reason has already been mentioned. Payment of money is an act which may be referred to so many different causes, that it does not need the existence of a contract to account for it; it does not unequivocally point to a contract between the parties, nor necessarily appear to have been made in pursuance of an agreement. The essential condition, therefore, fails for the introduction of parol evidence by which to establish the verbal contract; the primary element

(1) *Clinan v. Cooke*, 1 Sch. & Lef. 22, 40, per Lord REDESDALE. "It has always been considered that the payment of money is not to be deemed part performance to take a case out of the statute. *Seagood v. Meale*, Prec. Ch. 560, is the leading case on that subject; there a guinea was paid by way of earnest, and it was agreed clearly that it was of no consequence in case of an agreement touching lands. Now, if payment of fifty guineas could take a case out of the statute, payment of one guinea would do so equally, for it is paid in both cases as part payment, and no distinction can be drawn. But the great reason, as I think, why part payment does not take such an agreement out of the statute is, that the statute has said that in another case, viz., with respect to goods, it shall operate as part performance. And the courts have, therefore, considered this as excluding agreements for lands, because it is to be inferred that when the legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant that it should not bind in the case of lands." See, also, *O'Herlihy v. Hedges*, 1 Sch. & Lef. 123; *Watt v. Evans*, 4 Y. & C. Ex. 579; *Lord Pengall v. Ross*, 2 Eq. Cas. Abr. 46, pl. 12; *Lane v. Shackford*, 5 N. H. 132-134. An early case in Delaware, *Townsend v. Houston*, 1 Harring. 532, proceeded entirely upon this view, and because the statute of that state contained no provision concerning goods and chattels, similar to § 17 of the English act, it held that part payment of the price constituted a part performance of a verbal agreement for the sale of land. But the whole argument is clearly based upon a misconception. The statute of frauds does not say that payment shall operate as a part performance in the case of goods; it makes such payment *equivalent* to a memorandum; and according to the equitable theory, part performance is not considered as a substitute for the written memorandum; when admitted at all it completely displaces the statute, it creates such a state of circumstances that the application of the statute would be fraudulent.

of the equitable theory of part performance is wanting.(1) The third ground, and perhaps the one most satisfactory, is, that a payment of money by the plaintiff is not, in general, an act which renders it a fraud upon him if the defendant refuses to complete the contract. It does not so change his situation as to render a legal remedy either impracticable or inadequate; he can recover back the amount by an action at law, and thus be restored to his original position. Even the inability of the defendant to repay the money by reason of his own bankruptcy or insolvency, does not, in this respect, alter the relations of the parties so as to modify the rule, because there being nothing intrinsically fraudulent in the transaction, this circumstance is not a sufficient ground for imputing to the defendant the wrongful intent, which alone furnishes an occasion for the interference of equity to enforce the verbal agreement.(2)

SEC. 114. Whenever the foregoing reason fails—when it is impossible to restore the plaintiff to his original position by any legal remedy, then the fundamental conditions of the equity jurisdiction in case of part performance are fulfilled, and a payment is sufficient to take the verbal contract out of the statute of frauds. These special circumstances can hardly arise when the plaintiff has simply paid the purchase-price of land in money either wholly or partially; they rather occur, if at all, when the consideration of the agreement consists in work, labor and services personally done and rendered by the plaintiff himself, or procured to be done and rendered and paid for by him. In such a case, if the value of the services can be ascertained with reasonable accuracy in an action at law, and adequately compensated by a recovery of damages, neither the services themselves nor the payment for them will avail as a part performance of the verbal agreement.(3) But if the services are of such a peculiar character that it is

(1) See *ante*, § 107.

(2) See cases cited *ante*, § 104. Lord REDESDALE also gave this reason for the rule in *Clinan v. Cooke*, 1 Sch. & Lef. 22, 41. After laying down the general doctrine, "that nothing is to be considered as a part performance which does not put the party into a situation that is a fraud upon him, unless the agreement is performed," he added, "payment of money is not part performance, for it may be repaid, and then the parties will be just as they were before, especially if repaid with interest. It does not put a man, who has parted with his money, into the situation of a man against whom an action may be brought," as is the case with a vendee who has taken possession under a mere verbal agreement.

(3) *South Wales R'y Co. v. Wythes*, 1 K. & J. 186; *Frame v. Dawson*, 14 Ves. 386; *O'Reilly v. Thompson*, 2 Cox, 271; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279, 284. In *Frame v. Dawson*, 14 Ves. 386, Sir WM. GRANT thought that money expended in repairs came within this description, and could be compensated by damages,

impossible to estimate their value by any pecuniary standard, and it is evident that the parties did not intend to measure them by any such standard, then the plaintiff, after the performance of these services, could not be restored to the situation in which he was before, or be compensated by any recovery of legal damages. Under these circumstances, the rendition of the services, or the procuring them to be rendered, is a part performance of the verbal agreement, and the case is quite analogous to those in which outlays are made for improvements by a vendee or lessee under a parol contract,(1) This

so that the expenditure was not a sufficient part performance. It has been settled, however, that outlays in improvements, repairs and alterations constitute a good part performance of verbal contracts to sell or lease lands. See *post*, §§ 126-132. In *Edwards v. Estelle*, 48 Cal. 194, a surveyor and another person made a verbal contract, by which the surveyor agreed to search for and survey certain swamp lands, and the other party agreed to pay the first installment of the purchase price, procure a certificate of purchase, and then convey one-half of the land to the surveyor. The latter made the search, found the lands and surveyed them; and these acts were held to constitute no part performance, which took the contract out of the statute of frauds. The court said, per RHODES, J. (p. 196): "There are two propositions upon which the cases are very fully agreed; first, that the payment of purchase-money will not be regarded as part performance; and second, that the acts of part performance must be such that it would be a fraud upon him for the other party to refuse performance on his part. The term purchase-money, as employed in the proposition above stated, comprehends the consideration, whether it be money or property, or services, for which the lands are to be conveyed, and is not limited to money alone. Here the services to be performed by the plaintiff were the consideration for which the one-half of the lands were to be conveyed to him; and hence the performance of those services did not constitute a sufficient part performance within the meaning of the equitable rule. There is no ground for saying that the plaintiff, by his alleged acts of part performance, has been placed in such a position that the refusal of the defendants to convey the one-half of the lands will operate as a fraud upon him. The refusal to convey merely leaves him the creditor of the estate of Stewart (the other party to the contract who had died), and full compensation may be made for his services in money. He is in no worse position than if, instead of rendering the services, he had advanced their value in money." While this *decision* is undoubtedly correct, and the reasons for it given at the close of the extract are unquestionably sound, some of the generalizations concerning the consideration, ought, I think, to have been expressed with more limitations. And see *Cronk v. Trumble*, 66 Ill. 428; and *Chastain v. Smith*, 30 Geo. 96.

(1) *Rhodes v. Rhodes*, 3 Sandf. Ch. 279, 284; *Davison v. Davison*, 2 Beasley, 246; *Van Duyne v. Vreeland*, 1 Beasley, 142, 151; *Hill v. Gomme*, 1 Beav. 541. *Rhodes v. Rhodes* well illustrates the rule. A person verbally agreed to convey a tract of land to his brother, in consideration that the latter should support, nurse, and take care of him during his life-time. He was subject to epileptic fits, and the brother faithfully performed the agreement on his part; nursed, maintained and took care of the invalid during the rest of his life, but did not take possession of the land or do any other act directly affecting it. This contract was

principle is, at bottom, the same as that upon which the courts have proceeded, especially in a series of recent English decisions, in specifically enforcing certain agreements for continuous acts of labor and services, and construction of works where the legal remedy of damages for their breach is impracticable. It has, also, been applied under analogous circumstances, where the plaintiff has not, indeed, made any payment, but has done other acts in pursuance of the verbal agreement, but not directly affecting its subject-matter, which would leave him without adequate remedy unless the contract is enforced.(1) Payment of auction duty as required by statute in certain cases is not a part performance, because it is made obligatory, "and that without which there would have been no contract, cannot be said to be in part performance of the contract."(2) Payment of the price, although not of itself sufficient to admit the equitable remedy, is always regarded as a strong circumstance in connection with other acts, such as possession or the making improvements, which will be discussed in the succeeding paragraphs.

specifically enforced against the heirs of the vendor, the court holding that the services rendered by the plaintiff, or procured to be rendered were, under the circumstances, a part performance. The reasons for the decision are seen in the following extract: "Payment of the consideration will not, in general, be deemed such a part performance as to relieve a parol contract from the operation of the statute. But the reason for this, viz., that in such a case the repayment of the consideration will place the parties in the same situation in which they were before, shows that the rule applies to a moneyed consideration only. If the consideration for the contract be labor and services, those may sometimes be estimated and their value liquidated in money, so as necessarily to make the vendee whole on rescinding the contract. But in a case like this, where the services to be rendered were of such a peculiar character that it is impossible to estimate their value to the plaintiff by any pecuniary standard, and where it is evident that he did not intend to measure them by any such standard, it is out of the power of any court, after the performance of the services, to restore the plaintiff to the situation in which he was before the contract was made, or to compensate him in damages." The principle of this case is sound, and the decision itself is in strict conformity with the series of later English cases, which extend the remedy of specific performance to agreements for services. In *Davison v. Davison*, *supra*, services of a son were held to be a good part performance of his father's verbal agreement to leave him a farm after the father's death.

(1) *Malins v. Brown*, 4 N. Y. 403. The plaintiff had made no payment of purchase-money, but had, in pursuance of the contract, entered upon transactions which would entail upon him an injury not to be compensated by damage, and the court decreed a specific performance. *German v. Machin*, 6 Paige, 2 8; *Dugan v. Gittings*, 3 Gill. 133; *Gosden v. Tucker*, 6 Munf. 1; *Parker v. Smith*, 1 Coll. C. C. 608.

(2) *Buckmaster v. Harrop*, 7 Ves. 341; 13 Ves. 456. In this case it was argued by counsel that the payment should be held a part performance, because it could not be recovered back; but the court held as stated in the text.

SEC. 115. 5. I pass now to the consideration of those acts which do amount to a part performance. Possession alone of land, under a verbal contract, when delivered to the vendee or lessee, or taken by him with the consent of the vendor or lessor, or with the knowledge which implies such consent, is an act of part performance which takes the case out of the statute of frauds, even without the additional circumstances of the payment of consideration, or the making of improvements. This rule is settled by an overwhelming weight of authority in England and in this country, but has been disapproved by the courts of one or two states, which have, until recently, only possessed a very limited equity jurisdiction. The grounds upon which the doctrine has been based are two: *First*. That the possession would expose the vendee to liability as a trespasser, and for the rents and profits, unless he was permitted to show the authority under which he entered; and evidence having been admitted to prove the verbal contract for this purpose, there is nothing in the statute which prevents a court from giving its full force and effect in establishing the contract by such evidence; and *secondly*, in the language of an eminent equity judge, "the acknowledged possession of a stranger on the land of another is not explicable, except on the supposition of an agreement, and has, therefore, constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into its terms, the court regarding what has been done as a consequence of contract."(1)

(1) *Pain v. Coombs*, 1 DeG. & J. 34; *Coles v. Pilkington*, L. R. 19 Eq. 174; *Clinan v. Cooke*, 1 Sch. & Lef. 22, 41, per Lord REDESDALE; *Morphett v. Jones*, 1 Sw. 181, per Sir T. PLUMER; *Earl of Aylesford's Case*, 2 Stra. 783; *Lacon v. Mertins*, 33 Atk. 1; *Wills v. Stradling*, 3 Ves. 381; *Bowers v. Cator*, 4 Ves. 91; *Gregory v. Mighell*, 18 Ves. 328; *Kine v. Balfe*, 2 Ball & B. 343; *Pain v. Coombs*, 3 Sm. & Giff. 449; 1 DeG. & J. 34; *Shillibeer v. Jarvis*, 8 DeG. M. & G. 79; *Butcher v. Stapely*, 1 Vern. 363; *Pyke v. Williams*, 2 Vern. 455; *Seagood v. Meale*, Prec. Ch. 560; *Boardman v. Mostyn*, 6 Ves. 467; *Tilton v. Tilton*, 9 N. H. 386, 390; *Eaton v. Whitaker*, 18 Conn. 222, 229; *Murray v. Jayne*, 8 Barb. 612; *Malins v. Brown*, 4 N. Y. 403; *Pugh v. Good*, 3 Watts & S. 56, 61; *Allen's Estate*, 1 Watts & S. 383, 386; *Jones v. Peterman*, 3 Serg. & R. 543, 549; *Reed v. Reed*, 12 Pa. St. 117; *Johnston v. Johnston*, 6 Watts, 370; *Rhodes v. Frick*, 6 Watts, 315; *Stewart v. Stewart*, 3 Watts, 253; *Miller v. Hower*, 2 Rawle, 53; *Bassler v. Niesly*, 2 Serg. & R. 352; *Johnston v. Glancy*, 4 Blackf. 94, 98; *Anderson v. Simpson*, 21 Iowa, 399; *White v. Watkins*, 23 Mo. 423; *Catlett v. Bacon*, 33 Miss. 269; *Danforth v. Laney*, 28 Ala. 274; *Reynolds v. Johnston*, 13 Tex. 214. But see, questioning this rule, *Galbreath v. Galbreath*, 5 Watts, 146; *Wood v. Farmare*, 10 Watts, 195; *Dougan v. Blocher*, 12 Harris, 28; *Shepherd v. Shepherd*, 1 Md. Ch. 244; *Owings v. Baldwin*, 8 Gill, 337; *Morris v. Harris*, 9 Gill, 19; *Glass v. Hulbert*, 102 Mass. 25, 32; *Tatum v. Brooker*, 51 Mo. 148.

SEC. 116. It is necessary to ascertain more accurately the theory upon which equity proceeds in dealing with possession as a part performance. The mere physical fact of possession is not of itself conclusive, nor even material. The possession must be taken and held with the intent of carrying out and executing the agreement. The existence of this *intent* is vital, and is the essential element which the courts require as a condition of the part performance upon which a decree of specific execution may be based. This intent, however, cannot be shown by proving the verbal contract between the parties, for such a course would be a most vicious arguing in a circle.(1) It must, therefore, be established by matter outside of the agreement. When, however, a person who was a stranger to the estate takes and holds possession of land belonging to another, the mere fact that such possession is with the knowledge of such owner, and without any objection from him, raises a *prima facie* presumption of the requisite *intent*, and of a contract in pursuance of which the act was done.(2) When, on the other hand, the possession is not a *new* fact, but is the continuation of a former similar condition, as when it is by a tenant after the expiration of his term alleging a verbal contract to renew or to convey, the intent must be proved by some further *act* which clearly shows that possession must be accounted for by the new relation, and cannot be referred to the previous holding. Under such circumstances, the fact of possession raises no presumption as to the requisite intent.(3) It necessarily follows, from the theory as thus stated, that if the possession is not in pursuance of the agreement, but results from some distinct cause; or if it can be naturally and reasonably accounted for otherwise than by a contract between the parties, it will not avail as a part performance.(4) For example, the possession by a son of land belonging to his father, even when accompanied by valuable improvements, will not be treated as a part performance, because the relation between the parties prevents the inference which would

(1) See *ante*, § 107. *Wills v. Stradling*, 3 Ves. 378.

(2) See cases *ante*, § 115. *Lord v. Underdunk*, 1 Sandf. Ch. 46, 48; *Jervis v. Smith*, Hoff. Ch. 470, 475; *Thompson v. Scott*, 1 McCord Eq. 32, 39.

(3) *Morphett v. Jones*, 1 Sw. 172; *Wills v. Stradling*, 3 Ves. 378; *Gregory v. Mighell*, 18 Ves. 328; *Jones v. Peterman*, 3 Serg. & R. 543; *Poag v. Sandifer*, 5 Rich. Eq. 170; *Johnston v. Glancy*, 4 Blackf. 94, 99.

(4) *Smith v. Smith*, 1 Rich. Eq. 130, 133, 136; *German v. Machin*, 6 Paige, 289, 293; *Wolfe v. Frost*, 4 Sandf. Ch. 72; *West v. Flannagan*, 4 Md. 36; *Jacobs v. The Railroad*, 8 Cush. 223.

otherwise arise from the fact, and removes all necessity of accounting for the possession by the supposition of an existing contract.(1)

SEC. 117. It has been said, in some judicial decisions, that possession is an indispensable element in the part performance of a verbal contract for the sale of land—in other words, that the part performance of such a contract is impossible without a change of possession;(2) but this conclusion is clearly incorrect. Many other acts, without a possession fully satisfy all the requisites of a part performance.(3) It is not essential that the contract should expressly stipulate for the delivery of possession. If the possession is taken in pursuance and execution of the agreement and with the knowledge of the vendor, it is a good part performance, although the contract be silent in respect to it.(4) As possession alone is sufficient, *a fortiori* possession delivered by the vendor, or taken with his knowledge and consent, when accompanied by other acts on the part of the plaintiff, constitutes a part performance of the most effectual and conclusive character; as possession and payment of the purchase-price in whole or in part;(5) or possession and the making of valuable improvements on the land.(6)

(1) *Eckert v. Eckert*, 3 Penn. 332; *Haines v. Haines*, 6 Md. 435; *Poorman v. Kilgore*, 2 Casey, 365; *Cox v. Cox*, 2 Casey, 375; *McCue v. Johnson*, 1 Casey, 306; *Ham v. Goodrich*, 33 N. H. 32. The same is true of possession held by one person under another standing to him *in loco parentis*.

(2) *Ackerman v. Fisher*, 57 Pa. St. 457; *Peifer v. Landis*, 1 Watts, 392; *McFarland v. Hall*, 3 Watts, 37; *McKee v. Phillips*, 9 Watts, 85. It will be noticed that these authorities are all from the decisions of Pennsylvania courts, which have very much narrowed the equitable doctrine of part performance.

(3) See *Mundy v. Jolliffe*, 5 Myl. & Cr. 167; *Hollis v. Edwards*, 1 Vern. 159; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279.

(4) *Harris v. Knickerbacker*, 5 Wend. 645; *Smith v. Underdunk*, 1 Sandf. Ch. 579; *Chambliss v. Smith*, 30 Ala. 366; *Gregory v. Mighell*, 18 Ves. 328.

(5) *Sutton v. Sutton*, 13 Vt. 79; *Wilkinson v. Scott*, 17 Mass. 251; *Davis v. Townsend*, 10 Barb. 347; *Lessee of Billington v. Welsh*, 5 Binney, 129; *Gilday v. Watson*, 2 Serg. & R. 407; *Greenswalt v. Horner*, 6 Serg. & R. 71; *Woods v. Farmare*, 10 Watts, 195; *Follmer v. Dale*, 9 Barr, 83; *Wible v. Wible*, 1 Grant (Pa.), 406; *Dugan v. Gittings*, 3 Gill. 140, 157; *Haines v. Haines*, 6 Md. 435; *Drury v. Conner*, 6 Harr. & J. 283; *Moale v. Buchanan*, 11 Gill. & J. 314; *Williams v. Pope*, *Wright (Oh.)*, 406; *Kelley v. Stanbery*, 13 Ohio, 408; *Tibbs v. Barker*, 1 Blackf. 58; *Hawkins v. King*, 2 A. K. Marsh. 108; *Thornton v. Vaughan*, 2 Scam. 218; *Shirley v. Spencer*, 4 Gilman, 583, 600; *Fitzsimmons v. Allen*, 39 Ill. 440; *Jones v. Pease*, 21 Wisc. 644; *Brewer v. Brewer*, 19 Ala. 481; *Finucane v. Kearney*, 1 Freeman Ch. 65, 68.

(6) *Newton v. Swazey*, 8 N. H. 9, 14; *Wetmore v. Whites*, 2 Caines Cas. 87, 109; *Parkhurst v. Van Cortland*, 14 Johns. 15; *Simmons v. Hill*, 4 Harris & McHen. 252; *Moreland v. Lemasters*, 4 Blackf. 383, 385; *Mims v. Lockett*, 33 Geo. 9; *Byrd v. Odem*, 9 Ala. 756, 764; *Johnson v. McGruder*, 15 Mo. 365;



In Massachusetts and in Pennsylvania, as it seems by the later authorities, the rule, as to the effect of possession, is much more restricted than that which prevails in England and generally in this country. Mere possession is not sufficient, and the notion that the possessor would be liable as a trespasser is rejected; the possession must be taken under such circumstances that a money compensation would be absolutely impossible, and that a refusal to execute the contract would be clearly unjust; and some of these decisions even deny that any possession can be a part performance, unless accompanied by payment of the consideration or the making of improvements.(1) Possession alone, without other acts of improvement and the like, is never a sufficient part performance of a parol gift of lands.(2)

SEC. 118. As the questions concerning specific performance may generally arise in two classes of suits, those prosecuted by vendees and those prosecuted by vendors, so the subject of possession as a part performance may be presented under these two aspects; first, when

*Despain v. Carter*, 21 Mo. 331; *Dugan v. Colville*, 8 Tex. 126; *Ottenhouse v. Burleson*, 11 Tex. 87. The following are additional cases where possession with improvements, and with or without any payment, has been held to constitute a part performance: *Potter v. Jacobs*, 111 Mass. 32; *Northrop v. Boone*, 66 Ill. 368; *Fall v. Hazelrigg*, 45 Ind. 576; *Lowry v. Buffington*, 6 W. Va. 249; *Howe v. Rogers*, 32 Tex. 218; *Freeman v. Freeman*, 43 N. Y. 34; *Peckham v. Barker*, 8 R. I. 17; *Welsh v. Bayaud*, 21 N. J. Eq. 186; *Richmond v. Foote*, 3 Lans. 244; *Hendrick v. Hern*, 4 W. Va. 620; *Neale v. Neale*, 9 Wall. 1; *Mims v. Lockett*, 33 Geo. 9; *Clayton v. Frazier*, 33 Tex. 91; *Tatum v. Brooker*, 51 Mo. 148; *McCarger v. Rood*, 47 Cal. 138; *Gregg v. Hamilton*, 12 Kans. 333; *Johnson v. Bowden*, 37 Tex. 621; *Wimberley v. Bryan*, 55 Geo. 198 (possession and part payment); *Green v. Finin*, 35 Conn. 178; *Ingles v. Patterson*, 36 Wisc. 373; *Hoffman v. Fett*, 39 Cal. 109; *Poland v. O'Conner*, 1 Neb. 50; *Cagger v. Lansing*, 43 N. Y. 550; *Moss v. Culver*, 64 Pa. St. 414; *Sackett v. Spencer*, 65 Pa. St. 89; *Adams v. Fullam*, 43 Vt. 592; *Wiswell v. Tefft*, 5 Kans. 263.

(1) *Glass v. Hulbert*, 102 Mass. 25, 32; *Moore v. Small*, 7 Harris, 461, 476; *Dougan v. Blocher*, 12 Harris, 28, 34; *Galbreath v. Galbreath*, 5 Watts, 146; *Woods v. Farmare*, 10 Watts, 195; *Brawdy v. Brawdy*, 7 Barr. 157. In *Dougan v. Blocher*, *supra*, *WOODWARD, J.*, said: "Possession, to be part performance, must be taken under and in pursuance of the contract, and it must be maintained as it was taken; and unless accompanied by such improvements as will not reasonably admit of compensation in damages, is not, even when so taken and maintained, such part performance of a parol contract as will take it out of the statute of frauds." In *Glass v. Hulbert*, *supra*, the theory that a vendee is liable as a trespasser, unless the verbal contract is admitted in defense to explain his possession, is emphatically repudiated on the ground that a parol license is a defense for acts done under it while unrevoked.

(2) *Stewart v. Stewart*, 3 Watts, 253, 255; *Eckert v. Eckert*, 3 Penn. 332; *Pinckard v. Pinckard*, 23 Ala. 649. The subject of parol gifts will be discussed at large in subsequent paragraphs—*post*, §§ 130, 131.

the vendee or lessee sues to enforce the verbal contract and relies upon a possession *taken* by himself with the consent of the vendor; *secondly*, when the vendor sues and relies upon a possession *delivered* by himself and accepted by the vendee. Although the former case is by far the most frequent in practice, the rule as to part performance applies with the same force and effect to the latter.(1) Having stated the theory upon which possession is regarded as a part performance, and described the generic cases to which it does or does not extend, I shall now examine the particular features and qualities of this possession, in order that it may avail to take a verbal contract out of the statute of frauds.

SEC. 119. 1. The possession of a vendee or lessee under a verbal contract, must be with the consent of the vendor or lessor, for otherwise the very feature of the transaction, which would render a refusal to execute the agreement a virtual fraud as against the purchaser, would be wanting.(2) Where the possession, however, is taken with the vendor's knowledge and without any objection on his part, this fact raises a presumption of his consent, and no further evidence of it is necessary.(3) If the original entry was without consent, but the vendor, on its coming to his knowledge, allows the possession to continue, the subsequent assent will affect the act from the beginning

(1) *Pyke v. Williams*, 2 Vern. 455; *Earl of Aylesford's Case*, 2 Stra. 783; *Harris v. Knickerbacker*, 5 Wend. 638; *Pugh v. Good*, 3 Watts & S. 56; *Reed v. Reed*, 12 Pa. St. 117; *Moore v. Small*, 19 Penn. St. 461; *White v. Crew*, 16 Geo. 416.

(2) See cases *ante*, §§ 104, 106. Also, *Howe v. Rogers*, 32 Tex. 218; *Freeman v. Freeman*, 43 N. Y. 34; *Moore v. Higbee*, 45 Ind. 487. A possession taken under another right than that given by the contract is not sufficient. *Jacobs v. Peterborough, etc.*, R. R., 8 Cush. 224; *Purcell v. Miner*, 4 Wall. 513.

(3) See *ante*, § 116. *Cole v. White*, cited 1 Bro. C. C. 409; *Gregory v. Mighell*, 18 Ves. 328; *Lord v. Underdunk*, 1 Sandf. Ch. 46, 48; *Jervis v. Smith*, Hoffman Ch. 470, 475; *Purcell v. Miner*, 4 Wall. 513; *Goucher v. Martin*, 9 Watts, 106; *Gratz v. Gratz*, 4 Rawle, 411; *Sage v. McGuire*, 4 Watts & S. 228; *Thompson v. Scott*, 1 McCord Eq. 32, 39; *Givens v. Calder*, 2 Dessau. Eq. 174; *Johnston v. Glancy*, 4 Blackf. 94; *Ash v. Daggy*, 6 Porter (Ind.), 259; *Carrolls v. Cox*, 15 Iowa, 455; *Millard v. Harvey*, 34 Beav. 237; 13 W. R. 125. Plaintiff's wife, without her husband's knowledge, paid to defendant 150*l.* with the design of purchasing a field for the plaintiff. A short time after defendant told plaintiff he might have the field to put his horse in. Plaintiff occupied the field ten years without paying any rent, and in ignorance of what his wife had done. Defendant refused to convey, but kept the money and paid no interest on it. *Sir JOHN ROMILEY, M. R.*, held that there was a contract with the wife as agent for the plaintiff, which was afterwards adopted by him; that as it was accompanied by possession with defendant's consent for ten years, this was a part performance, and it should be specifically enforced.

and make it a good part performance.(1) And when the possession has continued for a long time with the vendor's knowledge, he would probably be estopped from denying that it began with his consent.(2) The consent of the vendor may be inferred from his acts. If, for example, the land at the time of the sale is in the occupancy of a tenant of the vendor, and it is agreed between the parties that this tenant shall in future pay his rent to the vendee, and the tenant thereupon attorns to the vendee, the consent to a changing possession is thereby sufficiently shown.(3) Possession taken by a lessee of the vendee enures to the vendee's benefit, and if otherwise sufficient, is a good part performance.(4)

SEC. 120. 2. The possession must be actual and not merely nominal, open, visible, and notorious, so that the fact can be certainly proved by the testimony of eye-witnesses, and not left to be inferred by the court from doubtful and, perhaps, interested evidence. As the absence of a writing, as required by the statute, is, in some measure, supplied by the physical fact of possession, it is plain that the proof of that fact should be in a high degree satisfactory and certain.(5) When, therefore, the premises were, at the time of the verbal sale, occupied by a tenant of the vendor, who was left in the occupancy, but recognizing the vendee as his landlord, this occupation and attornment by the tenant was held not to be the open, and visible change of possession required by the rule in order to constitute a part performance; if such attornment could be effectual, it must itself be public, formal, so as clearly to indicate the possession to be that of the vendee.(6)

(1) *Gregory v. Mighell*, 18 Ves. 328; *Pain v. Coombs*, 1 DeG. & J. 34, 46.

(2) *Harris v. Knickerbacker*, 5 Wend. 645; *Thompson v. Scott*, 1 McCord Eq. 32. And acquiescence in the possession for a long time will be a strong circumstance to prevent the vendor from defeating the execution by setting up the statute. *Blatchford v. Kirkpatrick*, 6 Beav. 232. It has been held, however, that permitting the property to be occupied for a few months, when the profits of it were very small and no improvements were made, was not a sufficient part performance upon which to enforce the agreement. *Jervis v. Smith*, 1 Hoff. Ch. 470.

(3) *Williams v. Landman*, 8 Watts & Serg. 56, 60; *Pugh v. Good*, 3 Watts & S. 56. But whether these facts would, of themselves, constitute a sufficient physical possession by the vendee to satisfy the rule is a very different question. See *Bawdry v. Bawdry*, 7 Barr. 157.

(4) *Pugh v. Good*, 3 Watts & S. 56; and see *Williams v. Evans*, L. R. 19 Eq. 517.

(5) *White v. Watkins*, 23 Mo. 423; *Haslet v. Haslet*, 6 Watts, 464; *Frye v. Shepler*, 7 Barr. 91; *Moore v. Small*, 19 Pa. St. 461 *Johnson v. Glancy*, 4 Blackf. 94.

(6) *Bawdry v. Bawdry*, 7 Barr. 157.

SEC. 121. 3. The possession must be definite and exclusive; it must unequivocally show what land is possessed, and that it is possessed by the purchaser exclusively and not concurrently with the vendor; it must, in short, indicate the commencement of a new interest or estate.(1) This requisite was held wanting, and the possession accordingly insufficient in the following cases: Where a purchaser moved into the premises and remained there not as the sole, exclusive owner, but in company with a former occupant;(2) where the purchaser occupied the premises in question in common with adjacent land of his own, without having in any manner ascertained, marked out, or determined their extent and boundaries.(3) The rule concerning exclusive possession applies with special force to tenants in common. Where a plaintiff claims as purchaser of land to the possession of which he and others are entitled as tenants in common, or joint tenants, no mere possession by him can avail as a part performance; no possession can suffice which does not show his individual right to the exclusion of the other co-tenants.(4) The reason of this is obvious, and results from the nature of such co-ownership. Each tenant is entitled to the possession of the common estate; the possession of one is that of all the others. An entry and possession of the plaintiff claiming to be the vendee would not, therefore, tend to show a contract of sale from the others, or any interest in him to the exclusion of the others. That such a possession should operate as a part performance, there must have been some prior act of open disseizin, or some joint act of partition among all the co-owners. This rule, touching a verbal sale among co-tenants, does not at all interfere with the well-known doctrine of a parol partition. When co-tenants make

(1) *Blakeslee v. Blakeslee*, 10 Harris, 237; *Haslet v. Haslet*, 6 Watts, 464; *Moore v. Small*, 19 Pa. St. 461; *Robertson v. Robertson*, 9 Watts, 32, 41; *Frye v. Shepler*, 9 Barr. 91; *Goucher v. Martin*, 9 Watts, 106, 109; *Workman v. Guthrie*, 5 Casey, 495, 512; *Galbreath v. Galbreath*, 5 Watts, 146; *Zimmerman v. Wangert*, 31 Pa. St. 401; *Davis v. Moore*, 9 Rich. 215.

(2) *Frye v. Shepler*, 7 Barr. 91.

(3) *Haslet v. Haslet*, 6 Watts, 464.

(4) *Workman v. Guthrie*, 5 Casey, 495, 512; *Galbreath v. Galbreath*, 5 Watts, 148; *Blakeslee v. Blakeslee*, 10 Harris, 257. In *Workman v. Guthrie*, Woodward, J., said: "What, then, it may be asked, can there be no sale of land by parol among tenants in common where all are in possession? Certainly not; because the statute of frauds forbids it, and there cannot be such part performances as would take it out of the operation of that wise and statutory rule of titles." This doctrine applies with equal force, as is stated in the text, to the case where the tenants in common are not all in actual possession; because where *one* is in possession all are in possession, unless there has been a disseizin.

a parol partition of the land among themselves, and each one takes exclusive possession of his own share thus allotted, it is settled that the statute of frauds does not apply, and a court of equity will confirm and enforce the division by its decree.(1) The same rule also applies to verbal family arrangements, compromises, and exchanges, when carried into effect by an exclusive possession of his individual lands by each party;(2) and to verbal compromises or settlements of boundaries and titles between adjacent proprietors, if followed by exclusive possession and enjoyment.(3)

SEC. 122. 4. The possession must be of the very tract of land bargained for in the contract, and which forms the subject-matter of the suit. This proposition requires no authorities directly in its support, and is either tacitly assumed or expressly asserted in all the decisions which discuss the doctrine of possession as applied to distinct parcels included in one agreement.(4) The question may be presented in three cases—*first*, where the contract embraces only one parcel of land; *second*, where several distinct parcels are bargained for by one entire contract for one gross consideration; and *third*, where several distinct parcels are bargained for by separate contracts and for separate prices, although they are all sold at the same time and in the same general transaction—as, for example, at one auction sale. It is, of course, assumed in each of the two latter cases that all the parcels are sold by the same vendor and bought by the same vendee; if the purchase is made from different owners, or by different vendees, no question could of course arise. In the third case, where distinct parcels are sold to one purchaser by separate agreements, although at the same time in one general transaction, as at an auction, it is fully settled that a possession of one parcel will not consti-

(1) *Corbin v. Jackson*, 14 Wend. 619; *Pratt v. Hubbell*, 3 Ohio St. 243; *Slice v. Derrick*, 2 Rich. 7; *Willey v. Bonney*, 31 Miss. 634; *City of Natchez v. Vandervelde*, 31 Miss. 706, 720; *Calhoun v. Hayes*, 8 Watts & S. 127; *Rhodes v. Frick*, 6 Watts, 315; *Rhine v. Robertson*, 27 Pa. St. 30; *Loung v. Frost*, 1 Md. 377; *Goodhue v. Barnwell*, Rice Eq. 198; *Weed v. Terry*, 2 Doug. 344; *Cummings v. Nut*, *Wright (Ohio)*, 713; *Sweeny v. Miller*, 34 Me. 388.

(2) *Neale v. Neale*, 1 Keen, 672; *Stockley v. Stockley*, 1 V. & B. 23.

(3) *City of Natchez v. Vandervelde*, 31 Miss. 706, 720; *Davis v. Townsend*, 10 Barb. 333; *Lindsay v. Springer*, 4 Harring. 574; *Boyd v. Graves*, 4 Wheat. 513; *Blair v. Smith*, 1 Bennett (Mo.), 273; *Fuller v. County Comm'rs*, 15 Pick. 81; *Kip v. Norton*, 12 Wend. 127.

(4) *Buckmaster v. Harrop*, 7 Ves. 341; *Smith v. Underdunk*, 1 Sandf. Ch. 579; *Jones v. Pease*, 21 Wisc. 644; *Allen's Estate*, 1 Watts & S. 384, 389; *Pugh v. Good*, 3 id. 56.

tute a part performance in respect to the other parcels ;(1) and *a fortiori* this would be so, if the sales of the various parcels took place at different times, for there would then be no appearance even of one single and entire contract. In the second case, where the several distinct parcels are sold to the same vendee by one entire contract and for a gross price, the rule, as generally adopted, makes the proper possession of one parcel a sufficient part performance as to all.(2) This doctrine, however, has been expressly repudiated in Pennsylvania.(3) The rule applicable to the first of these three cases is necessarily included in that which governs the second. Although the possession of the one tract must have the qualities heretofore described, it need not equally extend as an actual *user* to all portions of the soil. It must be such as to indicate the whole tract claimed, and to assert a proprietorship over it ; but it need only be reasonable, customary, and according to the usages of the neighborhood, if it be agricultural land, or according to the nature and condition of the premises themselves.(4)

SEC. 123. 5. The possession must be in pursuance of the contract, and with the view to carry it into execution. The meaning of this rule is, that possession, in order that it may of itself constitute a part performance, must be of such a nature and under such circumstances that it shall naturally and reasonably be accounted for by the suppo-

(1) *Buckmaster v. Harrop*, 7 Ves. 341 ; and see cases cited in the two following notes.

(2) *Smith v. Underdunk*, 1 Sandf. 579, 581 ; *Jones v. Pease*, 21 Wisc. 644 ; this rule is implied by the decision of Sir W. GRANT in *Buckmaster v. Harrop*, *supra* ; and see *Dock v. Hart*, 7 W. & S. 172.

(3) *Allen's Estate*, 1 Watts & S. 384, 389 ; *Pugh v. Good*, 3 id. 56, 61 ; *McClure v. McClure*, 1 Barr. 374, 379.

(4) *Sutherland v. Briggs*, 1 Hare, 26, per WIGRAM, V. C. : "It was next said that the justice of the case would be satisfied by giving to the plaintiff so much of the meadow as the house stands upon, which the defendant offered to do. To the suggestion that justice would be satisfied by doing this, I cannot accede ; for some additional portion of the meadow would be essential to the enjoyment of the house. The rules of this court, however, will not permit me so to consider the case. If the acts done by the plaintiff are to be considered acts of part performance, taking the case out of the operation of the statute, the rules of the court entitle him to prove the entire agreement which the acts relied upon were intended partly to perform. The act of building part of the house upon the meadow was an act affecting the whole tenement, viz. : the meadow, and not that part of it only upon which the house stands. The case of *Mundy v. Jolliffe*, 5 My. & Cr. 167, will apply also to this part of the present case." See, also, *Howe v. Hall*, 4 I. R. Eq. 242 ; but see *Frame v. Dawson*, 14 Ves. 386. The recent case of *Miller v. Ball*, 64 N. Y. 286, is an admirable illustration of the text.

sition of a contract rather than of any other relation between the parties, and shall thus clearly indicate the commencement of a new interest or estate in the land on the part of the possessor.(1) This is nothing more than the application of a general principle heretofore discussed to this particular instance of part performance. It follows, therefore, that if the possession is not connected with the contract, but is referable to some other cause;(2) or if it can be naturally and reasonably accounted for upon some supposition other than that of a contract, it will not be a part performance.(3)

SEC. 124. This rule has its most frequent application to cases in which the possession is not a new fact, but is the uninterrupted continuation of a former condition. It results as a necessary corollary from the rule itself that such a possession—one, that is, which merely prolongs a pre-existing situation of the party in reference to the land, cannot alone be a part performance of an intervening contract, since it will be accounted for by the prior condition as naturally as by the new agreement.(4) If, therefore, a verbal agreement is made by a lessor

(1) *Cole v. White*, cited 1 Bro. C. C. 409; *Morphett v. Jones*, 1 Sw. 181; *Walker v. Walker*, 2 Atk. 100; *Whitbread v. Brockhurst*, 1 Bro. C. C. 417; 2 V. & B. 154, n.; *Hawkins v. Holmes*, 1 P. Wms. 770; *Att'y Gen. v. Day*, 1 Ves. 221; *Wills v. Stradling*, 3 Ves. 378; *Buckmaster v. Harrop*, 7 Ves. 346; *Hollis v. Edwards*, 1 Vern. 159; *Meynell v. Surtees*, 3 Sm. & Giff. 101; *Farrall v. Davenport*, 3 Giff. 363; *Robertson v. Robertson*, 9 Watts, 32, 42; *Stoddart v. Tuck*, 4 Md. Ch. 475; 5 Md. 184; *Anderson v. Chick*, 1 Bailey Eq. 118, 124; *Hood v. Bowman*, Freeman Ch. 290, 293; *Ham v. Goodrich*, 33 N. H. 32. See, also, *Peckham v. Barker*, 8 R. I. 17; *Welsh v. Bayard*, 21 N. J. Eq. 186; *Richmond v. Foote*, 3 Lans. 244; *Moore v. Higbee*, 45 Ind. 487; *Wood v. Thornby*, 53 Ill. 464.

(2) *Smith v. Smith*, 1 Rich. Eq. 130.

(3) *German v. Machin*, 6 Paige, 289, 293; *Cox v. Cox*, 2 Casey, 375; *Poorman v. Kilgore*, 2 Casey, 365; *Jacobs v. Railroad Co.*, 8 Cush. 223.

(4) *Jones v. Peterman*, 3 Serg. & R. 543; *Christy v. Barnhart*, 14 Pa. St. (2 Harris), 260; *Aitkin v. Young*, 12 Pa. St. (2 Jones), 15; *Poag v. Sandifer*, 5 Rich. Eq. 170, and see cases cited in the next succeeding note. *Wilmer v. Farris*, 40 Iowa, 309 (verbal contract of sale by one partner to another, and the only change was the withdrawal of the vendor, leaving the vendee in sole possession, not a part performance, enabling the vendee to enforce the contract; *qu.*, might not it have been sufficient to enable the vendor to enforce?); *Moote v. Scriven*, 33 Mich. 500 (a verbal agreement by defendant to advance money for the purchase of land and to pay off incumbrances on it, and to transfer the land to the plaintiff on his repayment of the advance; the plaintiff was in possession at the time of the agreement, and continued in possession, and did no other acts of part performance; *held*, his possession not a sufficient part performance. If, however, the purchaser, although in possession at the time of the contract, so that there is no change of his possession referable to it, goes on and makes permanent improvements and pays part or all the price, these acts will constitute a sufficient part performance); *Edwards v. Fry*, 9 Kans. 417. See, also, as illustrations of the

with his tenant, either during the tenancy or after its termination, to grant another lease in place of the existing one, or to renew the lease after the expiration of the prior one, or to sell and convey the land itself, the possession of the tenant continued as under the former holding cannot of itself be a part performance of the agreement. If the original tenancy has not expired, the possession must, of course, be referred to that; if it has expired, the possession will more naturally be accounted for by the tenant's holding over than by a new contract. As has already been shown, such possession does not raise a presumption as to the intent of the possessor, as is the case where he is an entire stranger to the estate; it must be accompanied by some further act on the part of the tenant in order to stamp its character and connect it with the contract.(1) Whenever, after the expiration of the term, the tenant's possession, by means of some accompanying act or other circumstances, can only be reasonably accounted for by the supposition of a contract for a renewed lease, it is a good part performance.(2) It is, therefore, now settled, after some expressions of doubt, and with a few conflicting decisions, that possession by a tenant after the expiration of his former term, and payment by him of an increased rate of rent, are together a part performance of a verbal contract for a renewal of the lease.(3) In like manner, such

general rule stated in the text, *Peckham v. Barker*, 8 R. I. 17; *Rosenthal v. Freeburger*, 26 Md. 75; *Crawford v. Wick*, 18 Ohio St. 190; *Mahana v. Blunt*, 20 Iowa, 142.

(1) *Wills v. Stradling*, 3 Ves. 381; *Smith v. Turner*, Prec. Ch. 561; *Savage v. Carroll*, 1 Ball & B. 265; *Morphett v. Jones*, 1 Sw. 181; *Seagood v. Meale*, Prec. Ch. 560; *Gregory v. Mighell*, 18 Ves. 328; *Kine v. Balfe*, 2 Ball & B. 343; *Cole v. Potts*, 2 Stockt. Ch. 67; *Smith v. Smith*, 1 Rich. Eq. 130; *Hatcher v. Hatcher*, 1 McMullan Eq. 311, 318; *Anthony v. Leftwich*, 3 Rand. 238, 256; *Johnston v. Glancy*, 4 Blackf. 94, 99; *West v. Flannagan*, 4 Md. 36; *Workman v. Guthrie*, 5 Casey, 495, 572; *Jones v. Peterman*, 3 Serg. & R. 543; *Christy v. Barnhart*, 2 Harris, 260; *Aitkin v. Young*, 12 Pa. St. 15; *Greenlee v. Greenlee*, 22 Pa. St. 225; *Wilde v. Fox*, 1 Rand. 165; *Rosenthal v. Freeburger*, 26 Md. 76; *Carroll v. Cox*, 15 Iowa, 455; *Mahana v. Blunt*, 20 Iowa, 142; *Anderson v. Simpson*, 21 Iowa, 399; *Armstrong v. Katterhorn*, 11 Ohio, 265; *Danforth v. Laney*, 28 Ala. 274.

(2) *Dowell v. Dew*, 1 Y. & C. C. C. 345; *Pain v. Coombs*, 1 DeG. & J. 34. And the same is true of a purchaser. Although in possession at the time of the contract, still if he afterwards pays part or all of the price and makes permanent improvements, this will constitute a part performance. *Edwards v. Fry*, 9 Kans. 417; *Brown v. Jones*, 46 Barb. 400; *Spear v. Orendorf*, 26 Md. 37; *Watson v. Mahan*, 20 Ind. 223; *Blunt v. Tomlin*, 27 Ill. 93; *Holmes v. Holmes*, 44 Ill. 168; *Morrison v. Peay*, 21 Ark. 110; *Howe's Heirs v. Rogers*, 32 Tex. 218.

(3) *Wills v. Stradling*, 3 Ves. 378; *Nunn v. Fabian*, L. R. 1 Ch. 35; *Clarke v. Reilly*, 2 I. R. C. L. (Exch.) 422; *Howe v. Hall*, 4 I. R. Eq. 242; *Archbold v. Ld. Howth*, 1 I. R. C. L. 608; *Lincoln v. Wright*, 4 DeG. & J. 16; *Spear v. Orendorf*,



possession either before or after the end of the term, and a payment which could not be referred to the old rent, but could only be explained on the supposition of a contract, should be part performance of a contract by the lessor to sell and convey the land. It is, also, well settled that a tenant's continued possession, and the making by him, in pursuance of stipulations contained in the agreement, of substantial improvements on the land, constitute a part performance of a verbal agreement to grant a renewal of the lease, or it would seem, of a contract to convey the fee.(1) These improvements, how-

26 Md. 37; *Wilde v. Fox*, 1 Rand. 165; *Williams v. Landman*, 8 Watts & S. 55; *Shepherd v. Walker*, L. R. 20 Eq. 659; but see *Rosenthal v. Freeburger*, 26 Md. 75. In *Wills v. Stradling*, Lord LOUGHBOROUGH said: "Payment of additional rent *per se* is an equivocal circumstance, it is true. It may be that he shall hold over, from year to year, the lease being expired. There may be other inducements. But how stands the averment upon this plea? It is that the landlord accepted the additional rent upon the foot of the agreement. Then the acceptance upon the ground of the agreement, which is the averment upon this plea, is not equivocal at all." The bill alleging such an agreement and a possession and payment of the rent, which had been accepted by the landlord upon the strength of the agreement, the lord chancellor would not allow the bill to be defeated by a plea of the statute of frauds, but ordered it to stand as an answer so that the issue of fact raised might be tried and decided at the hearing. In *Nunn v. Fabian*, *supra*, a landlord verbally agreed to give his tenant a renewal lease for twenty-one years at an increased rent, with the option of purchasing the freehold, but died before executing the lease. The tenant had, before the lessor's death, paid him one quarter's rent at the advanced rate, and had made some slight repairs. *Held*, by Lord CRANWORTH, reversing the decision of the M. R., that the possession and payment of rent at the advanced rate amounted to a part performance, and a specific execution was decreed at the suit of the tenant. No stress was placed upon the fact of the repairs in this case. From this it appears that the payment of a single quarter at the new rate is sufficient, and on principle it should be as much as the payment of a year's rent or more, for it points with certainty to the new interest created by the agreement, which is all that the rule ever requires.

(1) *Wills v. Stradling*, 3 Ves. 378, 382, per Lord LOUGHBOROUGH; *Mundy v. Jolliffe*, 5 My. & Cr. 167, reversing 9 Sim. 413; *Sutherland v. Briggs*, 1 Hare, 26; *Howe v. Hall*, 4 I. R. Eq. 242; *Savage v. Carroll*, 1 Ball & B. 265; *Dowell v. Dew*, 1 Y. & C. C. C. 345; *Mahon v. Baker*, 2 Casey, 519; *Williams v. Evans*, L. R. 19 Eq. 547. A. a tenant in possession made a verbal contract with the landlord for a lease of thirty years. A. had contracted to sub-let to B., and B. expended money in alterations and repairs with the knowledge and approval of the landlord. *Held*, as much a part performance as if made by A., and B. was entitled to a specific execution of the contract. In *Mundy v. Jolliffe*, *supra*, which is the leading case on this particular point, the plaintiff, a tenant of a farm from year to year, had entered into a parol agreement with his landlord, the defendant, for a lease, and in pursuance thereof repaired the buildings, drained the land, and converted the only piece of arable land belonging to the farm into pasture land. Lord COTTENHAM held there was no doubt these acts constituted a part

ever, must be of such an extent and kind that they are reasonably referable to the new agreement, and not such as would necessarily or naturally occur under the old condition of affairs.(1) Finally, the

performance, and he decreed a specific execution of the contract, reversing the decision below of V. C. SYADWELL. In *Sutherland v. Briggs*, *supra*, the plaintiff was the lessee of a house and other premises for thirty-one years, at rent of 60*l.*, and was bound to make certain improvements. He, also, held an adjoining meadow belonging to another owner, from year to year, for 9*l.* rent. The landlord of the house, etc., bought the meadow and verbally agreed to grant a lease of the same to the plaintiff. In pursuance of the stipulations of this parol bargain, the improvements were made more extensive than was before contemplated; part of the house was made to project over the meadow, and part of the meadow was attached to the original premises of which plaintiff held the lease. One-half of the expense of these alterations was paid by the plaintiff, which far exceeded the amount he had covenanted to expend for improvements by his lease, and he also signed a written promise to pay 80*l.* a year rent for the whole property. In a suit for a specific performance of the contract to lease the meadow, Sir JAMES WIGRAM, V. C., held that the extension of the house into the meadow by the plaintiff, in connection with the landlord, was evidence of a sufficient consideration for an agreement to lease the meadow; that the building the house upon the meadow was evidence of a right which extended to the whole of that field, and which could not be restricted so as to reach only that part of the meadow upon which the building actually stood; and that the extension of the house into the meadow and the increase and consolidation of the rents into one annual sum was evidence that the meadow was to be had for the same time as the premises of which the plaintiff had the lease. In other words, the verbal agreement concerning the meadow had been part performed by the plaintiff, and should be specifically enforced. On the general subject of the part performance, the vice chancellor said: "The first point suggested, rather than pressed, was that the plaintiff, being in possession of the meadow as tenant from year to year, the expenditure upon the property did not unequivocally show that it had proceeded upon some antecedent contract with the landlord. Undoubtedly it is, in general, necessary that an act of part performance, which is to take a case out of the statute of frauds, should unequivocally demonstrate the existence of some contract to which it must be referred. *Morphett v. Jones*, 1 Sw. 172. But if the act of extending the house, in which the tenant had an interest for a term of years, into the meadow, with the landlord's consent, be not evidence of a contract between them, I know not what act on the part of a tenant in possession of property could possibly be so considered. Circumstances much less stringent have been deemed sufficient; and if the case of *Mendy v. Jolliffe* may be considered as correctly illustrating the rule of this court, as to the acts of part performance which will take a case out of the statute, the alterations of the garden fence and making the plantation in the meadow, would be sufficient. In that case, the expenditure by the tenant was in draining the land, and the court decreed Mr. Jolliffe to grant him a lease upon the promise of which it was said the expense of draining had been incurred."

(1) *Brennan v. Bolton*, 2 Dru. & War. 349, in which the outlay for improvements relied on, was not greater than would be made by the tenant in the ordinary course of farming, and L. Ch. SUGDEN held that it would be against all authority to say that such acts amounted to a part performance. *Frame v. Dawson*, 14 Ves. 385.

possession by a tenant, together with further acts on his part which are neither payment of increased rent nor improvements, may be a sufficient part performance of such a verbal agreement.(1)

SEC. 125. It follows, as a necessary corollary from the rule under discussion, stated in section 123, that the possession which shall be a sufficient part performance must be subsequent in point of time to the contract which it renders binding; and, except in the case of a new agreement between a tenant and his landlord, or of some similar relation, the act of taking possession must be performed after, or at all events simultaneously with, the conclusion of the contract between the parties.(2) Taking possession, therefore, and making improvements in anticipation of a right expected to arise from a future contract has been held unavailable as part performance of the verbal contract which was afterwards actually entered into;(3) nor even a possession taken at the time when the negotiation between the parties commenced, although such negotiation resulted in a concluded agreement, and the possession was continued after the bargain was thus made.(4) The further requisite has been added by certain cases, that the possession, when taken in pursuance and execution of a verbal contract, must be continued without interruption down to

(1) *Parker v. Smith*, 1 Coll. C. C. 608. Four tenants in partnership held a colliery under a lease which had several years yet unexpired. The landlord entered into a verbal agreement with all the four, whereby, on the surrender of the old lease, he undertook to grant a new one to two of them (the plaintiffs), it being part of the bargain that the partnership should be dissolved, and that the two who were to receive the new lease and carry on the business, should release the other two from all liability. The partnership was therefore dissolved, and the plaintiffs released to the retiring members, and thereby assumed the entire liability of the old firm and of the new business. The two members, continuing in possession, brought suit for a specific performance, and the possession and the acts aforesaid were held by V. C. KNIGHT BRUCE to be a part performance. He said: "It is part of the entire agreement that the dissolution and release shall take place. They do take place. It is impossible to treat these acts otherwise than as acts of part performance, taking the case out of the statute of frauds." This case furnishes an admirable illustration of the general doctrine of part performance. The plaintiffs having dissolved their firm and released the other partners had so changed their own position, that they could not be restored to their original situation, nor was there any adequate compensation in damages. The fundamental principle was complied with, although none of these acts concerned the subject-matter of the contract—the lands

(2) *Christy v. Barnhart*, 2 Harris, 260; *Aitkin v. Young*, 2 Jones, 15; *Eckert v. Eckert*, 3 Penn. 332; *Dougan v. Blocher*, 12 Harris, 28; *Reynolds v. Hewett*, 27 Pa. St. 176; *Myers v. Byerly*, 45 Pa. St. 368.

(3) *Eckert v. Eckert*, 3 Penn. 332.

(4) *Dougan v. Blocher*, 12 Harris, 28.

the time of commencing the equitable suit to enforce a specific performance of such agreement.(1) It is certain that the possession, after it has once commenced, cannot be abandoned, or the character of it changed in such a manner, or under such circumstances, as to show an intent that it should thereafter be referred to some other cause than the contract, or an intent to surrender all right and interest under the contract; by such an abandonment or change, all the benefits of the original possession, as a part performance, would be lost, and in this sense the possession must be retained by the party who relies upon it.(2) To conclude this branch of the discussion, it should be remembered that possession by the purchaser or intended lessee, under a verbal agreement to convey or to lease, does not relieve him from any of the obligations resting upon him as a condition to the enforcement of a specific performance—such, for example, as the duties to exercise diligence and good faith on his own part, and to perform whatever he is bound to do by the terms of the contract; and a failure in these respects will generally be a sufficient ground for refusing to grant the equitable remedy of specific execution.(3)

SEC. 126. 6. Improvements. The making of valuable permanent improvements on the land by a vendee or lessee, in pursuance of the agreement, and with the knowledge of the other party, is always considered to be the strongest and most unequivocal act of part performance by which a verbal contract to sell and convey, or to lease, is

(1) *Dougan v. Blocher*, 24 Pa. St. (12 Harris) 28; *Mundorff v. Howard*, 4 Md. 459. It is difficult to see any reasonable ground, upon principle, for this particular requirement, unless the possession is abandoned or changed in such a manner or under such circumstances, as to show an intent that it should be referred to some other cause than the contract in question, or an intent to surrender all right and claim under the contract. After the possession has commenced and lasted for a time, it seems possible that it should be interrupted or suspended by the vendee, from a variety of motives, without necessarily showing a design on his part thereby to give up or waive his rights under the agreement; nor does there seem to be any good reason why such a temporary suspension or interruption should necessarily operate as a waiver.

(2) A purchaser took possession in pursuance of his verbal contract, but afterwards attorned to the vendor as his landlord; this act, it was held, changed the character of the possession; it could no longer be accounted for by the agreement to sell and convey, but was merely an occupancy by a tenant. *Rankin v. Simpson*, 19 Pa. St. 471; *Dougan v. Blocher*, 24 Pa. St. 28. In Pennsylvania, it is also decided that the possession must be taken in the life-time of the vendor. *Sage v. McGuire*, 4 Watts & Serg. 228, 229.

(3) *McClellan v. Darrah*, 50 Ill. 249; *Dougan v. Blocher*, 24 Pa. St. 28, 33. This subject is fully treated in a subsequent chapter.

taken out of the statute.(1). It is very plain that such proceedings satisfy the equitable principle upon which the doctrine of part performance rests, much more completely than a mere possession does. If the purchaser has simply taken possession, it might seem possible for him to be restored to his former situation, and to be compensated in damages; but when he has made outlays for valuable and perma-

(1) *Wells v Stradling*, 3 Ves. 378, per Lord LOUGHBAUGH; *Savage v. Foster*, 5 Vin Abr. 524, pl. 43. when an intended lessee entered and built; *Sutherland v. Briggs*, 1 Ha. 26; *Stockley v. Stockley*, 1 V. & B. 23; *Toole v. Medlicott*, 1 Ball & B. 393; *Mundy v Jolliffe*, 5 My. & Co. 167; *Surcome v. Penniger*, 3 DeG. M. & G. 571; *Floyd v. Buckland*, 2 Freem. 208; 2 Eq. Cas. Abr. 44; *Mortimer v. Orchard*, 2 Ves. 243; *Wheeler v. D'Esterre*, 2 Dow. 359; *Norris v. Jackson*, 10 W. R. 228; *Crook v. Corporation of Seaford, L. R.*, 6 ch. 551; 10 Eq. 678; *Williams v. Evans*, L. R. 19 Eq. 547; *Coles v. Pilkington, L. R.* 19 Eq. 174; *Wilson v. West Harthlepool Ry. Co.*, 2 DeG. J. & S. 475; *Wilton v. Harwood*, 23 Me. 133, 134; *Newton v. Swazey*, 8 N. H. 9, 14; *Miller v. Tobie*, 41 N. H. 84; *Wetmore v. White*, 2 Caine Cas. 87, 109; *Parkhurst v. Van Cortland*, 14 Johns 15; *Adams v. Rockwell*, 16 Wend. 28; *Harder v. Harder*, 2 Sandf. Ch. 17; *Casler v. Thompson*, 3 Green. Ch. 59; *Martin v. McCord*, 5 Watts, 493; *Syler v. Eckhart*, 1 Binney, 378; *Simmons v. Hill*, 4 Har. & McHen. 252; *Harrison v. Harrison*, 1 Md. Ch. 331; *Shepherd v. Bevin*, 9 Gill. 32; *Rowton v. Rowton*, 1 Hen. & Mun. (Va.) 92; *Wilkinson v. Wilkinson*, 1 Dessau. Ch. 201; *Mims v. Lockett*, 33 Geo. 9; *Byrd v. Odem*, 9 Ala. 756, 764; *Cummings v. Gill*, 6 Ala. 562; *Brock v. Cook*, 3 Port. (Ala.) 464; *Finucane v. Kearney*, 1 Freeman, Ch. 65. 69; *Farley v. Stokes*, 1 Sel Eq. Cas. (Pa.) 422; *Blakeney v. Ferguson*, 3 Eng. (Ark.) 272; *Ottenhouse v. Burleson*, 11 Tex. 87; *Dugan v. Colville*, 8 Tex. 126; *Johnson v. McGruder*, 15 Mo. 365; *Despain v. Carter*, 21 Mo. 331; *Cummins v. Nutt*, *Wright (Ohio)*. 713; *Moreland v. Le Masters*, 4 Blackf. 388, 385; *Underhill v. Williams*, 7 Blackf. 125; *School District No. 3 v. McLoon*, 4 Wisc. 79; *Morin v. Martz*, 13 Minn. 191; *Johnson v. Glancy*, 4 Blackf. 94; *Tibbs v. Barker*, 1 Blackf. 58; *Thornton v. Henry*, 2 Scam. 218; *Bomier v. Caldwell*, *Harring. Ch.* 67, and see cases cited under section 117. In *Crook v. Corp'n of Seaford, L. R.* 6 Ch. 551; 10 Eq. 678. a municipal corporation passed a resolution, in 1830, to lease to the plaintiff the flat part of the sea beach opposite to his land, for 300 years, at a nominal rent. He took possession of the beach between lines drawn in prolongation of the sides of his lot, and built a wall and terrace along such part. In 1864, the corporation gave him notice to quit, and in 1869 brought ejectment. He then sued for a specific performance. *Held*, a good part performance, and the corporation bound, although their agreement was not under seal, and therefore not binding at law, and they were ordered to execute a lease. In *Williams v. Evans, L. R.* 19 Eq. 547, A., a tenant in possession, made a verbal contract for a lease of thirty years with defendant. A., had contracted to sublet to B., and B. had expended money in repairs and alterations, with the knowledge and approval of the lessor. *Held*, as much a part performance as if made by A., who was entitled to a specific performance. In *Coles v. Pilkington, L. R.* 19 Eq. 174, a verbal agreement was made to allow plaintiff to occupy a leasehold house for her life, on payment merely of the ground rent, rates, and taxes. She took possession, and on account of the agreement, changed her whole mode of life; this was held a sufficient part performance.

ment improvements, and thus changed the character of the property, it would be in the highest degree unjust for the owner, who has permitted these expenditures and alterations to be made in reliance upon the agreement, to interpose the statute and prevent the completion of his contract, and at the same time retain and enjoy all the benefit of the additional value imparted to his land. For these reasons, the courts have never hesitated to assert and enforce the rule as above stated. There are important differences in the quality of the act considered as a part performance, between possession and the making of improvements. In the first place, mere possession might be explained by a tenancy at will, while expenditures upon permanent and valuable improvements cannot be reasonably accounted for, except upon the supposition of an actual interest or estate in the land, not depending upon any contingency, or liable to be suddenly terminated. *Secondly*. As the possession of a stranger cannot, in general, continue long without the owner's knowledge, it naturally follows, as has already been shown, that from the fact of such possession without objection, a *prima facie* presumption arises that it was taken and has continued with the owner's consent, and no direct evidence of such consent is necessary; but, on the other hand, as improvements might easily be made without the owner's knowledge, no such presumption arises from the mere fact that valuable and permanent improvements have been made by the purchaser or lessee, and he must prove the vendor's consent thereto by additional evidence.

SEC. 127. That the making of improvements shall be a part performance, they must possess certain qualities—as is true in the case of possession; and these essential attributes I now proceed to describe: 1. The improvements must be of a kind which would naturally and reasonably be done under a contract, so as to indicate the existence of a contract to account for them; they must be made on the faith of the contract, and must of course be subsequent to it.<sup>(1)</sup> This rule is a particular instance of the general principle which governs all species of part performance, and has already been discussed with sufficient fullness. If, therefore, improvements are made under such circumstances, or by a person holding such relations to the legal owner of the land, that a contract need not be reasonably assumed in

(1) *Hamilton v. Jones*, 3 Gill & J. 127; *Byrne v. Romaine*, 2 Edw. Ch. 445; *Farley v. Stokes*, 1 Sel. Eq. Cas. (Pa.) 422; *Carlisle v. Fleming*, Harring. Ch. 421. See, also, cases illustrating the same rule as applied to possession, *ante*, §§ 123, 125; *Wood v. Thornly*, 58 Ill. 464.

order to explain them, they will not, any more than mere possession, be availing as a part performance.(1) The opinion<sup>1</sup> has been maintained that the improvements must not only be made upon the faith of the agreement and with the assent of the vendor, but also that they must have been actually stipulated for by its terms, since, as it is argued, they cannot otherwise be said to be *in execution* of the contract.(2) No decision, however, has turned upon this alleged requirement, and the conclusion itself is drawn from a very technical notion of executing a contract. It is well settled that possession need not be provided for in the agreement, but if taken in pursuance of it—that is, because of it, such possession is none the less in execution of it.(3) If a verbal contract is made to sell and convey a tract of land, the purchaser becomes thereby vested with the equitable title, and any acts done upon the land by him as owner, or which proceed from and tend to show such ownership, are in fact done in execution of the contract—in other words, they carry the contract into effect. No acts more clearly indicate a proprietorship in the purchaser, and therefore point more unequivocally to the agreement from which such proprietorship arises, than the making of valuable and permanent improvements on the land; and this result is evidently the same, whether the improvements were stipulated for or not; indeed, the making improvements, when the contract was utterly silent in reference thereto, is perhaps the more emphatic assertion of the purchaser's interest, of his equitable estate, and of his purpose to carry the agreement into effect. The opinion above referred to, plainly rests upon no foundation of principle, is opposed to the equitable theory of part performance, and is not sustained by decisions of authority.

SEC. 128. 2. The improvements, in order to avail as a part performance, must not only be valuable, but must be permanent in their nature and beneficial to the estate.(4) We have seen that when a

(1) As, for example, improvements by a son made on land owned by his father. *Eckert v. Eckert*, 3 Penn. 332; *Haines v. Haines*, 6 Md. 435.

(2) This position is taken by Mr. Roberts, who insists that unless the improvements are bargained for in the contract, they cannot be relied on as a part performance; and the language of certain cases may be regarded as supporting this view. *Roberts on Fraud*, p. 135.

(3) See *ante*, §§ 117, 123.

(4) See cases *ante*, § 126; *Hollis v. Edwards*, 1 Vern. 159; *Deane v. Izard*, 1 Vern. 159; *Dayenport v. Mason*, 15 Mass. 92; *Wolfe v. Frost*, 4 Sandf. Ch. 72; *Wack v. Sorber*, 2 Whart. 387; *Hamilton v. Jones*, 3 Gill. & J. 127. In this last case, the plaintiff, a mill owner, had made a verbal agreement with the owner of adjoining land, for the purchase of a portion thereof. The plaintiff then, at his own expense, dug a ditch through said land by which to supply his own mill

tenant in possession relies upon his improvements to support a parol agreement for a renewal, they must be something more than the ordinary employment of the land, or the beneficial effects which would result from its customary use of the land according to the terms of his former holding.(1) The same *principle* must apply, under the changed circumstances, to every verbal contract for the sale or lease of land. Improvements, so far as they are to constitute a part performance, must go further than an ordinary use of the premises; they must add some permanent and substantial benefit to the corpus of the soil. In the foot note I have collected a number of cases which show what acts have been held in compliance with the rule.(2) If the outlays have permanently benefited the estate, it is not required in addition, that they should have been judicious. There are two reasons for this conclusion: *First*, it would often require a long, difficult and perplexing examination if the court were bound to decide this collateral issue as to the expediency of the purchaser's proceedings; and *secondly*, it would *always* be highly unjust, if the owner, who would retain the improvements confessedly valuable and beneficial to his property, were allowed to defeat his agreement upon the plea that they were injudicious.(3)

SEC. 129. 3. The circumstances of the case, and the relations of the parties must be such that the loss of his improvements, resulting from a failure to complete the agreement, would be an actual sacrifice on the part of the purchaser. On this ground, it has been held that the vendee cannot enforce a specific performance of the agreement, when he has gained more by the possession and use of the land than he loses by giving up the improvements which he has made;(4) or when he has been fully compensated for his outlays in making the improvements.(5) I cannot think that these decisions can be recon-

with water. This act was held not a part performance of the contract, because, although the plaintiff expended money, the ditch which he dug was no benefit to the land through which it ran, but rather an injury; it was a benefit only to other land owned by the plaintiff, and so did not meet the requirements of the sale. See, also, *Ann Berta Lodge v. Leverton*, 42 Tex. 18; *Peckham v. Barker*, 8 R. I. 17; *Mims v. Lockett*, 33 Geo. 9.

(1) *Ante*, § 124.

(2) Whether the improvements must amount to an occupation. *Ackerman v. Fisher*, 57 Pa. St. 457, and see cases cited under section 117.

(3) *Whitbread v. Brockhurst*, 1 Bro. C. C. 417, per Lord THURLOW, "whether the money has been well or ill laid out is indifferent; the fraud is the same."

(4) *Wack v. Sorber*, 2 Whart. 387.

(5) *Eckert v. Eckert*, 3 Penn. 332; *Ash v. Daggy*, 6 Porter (Ind.), 259. It may be remarked that the Pennsylvania courts have shown a strong bias against the entire



ciled with the principles of equity, which are generally accepted as governing the subject of part performance. Equity does not, under any circumstances, permit the owner both to retain his land and to enjoy, without return, the benefit of the improvements which the purchaser has made on the faith of his contract. If the court refuses to enforce a verbal agreement because its terms are not proved with certainty, or because the acts of part performance are not sufficiently made out, it will nevertheless compel the vendor to compensate the purchaser for the fair value of whatever substantial improvements he has made.(1) The effect of improvements, in connection with possession, has already been described under the preceding subdivision.(2) It should be remembered that many of the essential qualities and incidents of a possession, in order that it should constitute a part performance, are also necessary in the case of improvements; speci-

doctrine of part performance, as a means of avoiding the statute of frauds, and have restricted its operation within narrow limits. It may well be doubted whether these decisions would be regarded as authoritative in states where the equitable jurisdiction is recognized to its full extent. In *Ann Berta Lodge v. Leverton*, 42 Tex. 18, it was held that possession by the vendee, and his expenditure for improvements, of an amount not exceeding the sum received by him for the rents of the premises, did not amount to a sufficient part performance. Here the court utterly ignored the fact of possession as a sufficient part performance in itself. In the case of *Mims v. Lockett*, 33 Geo. 9, the court laid down a very different, and in my opinion the correct doctrine; it held that possession and the making of improvements by the vendee are a sufficient part performance of a verbal contract of sale, without regard to the amount of benefits received by the vendee from the use of the land, in comparison with the sum expended by him for improvements; that the value of these benefits equaled or exceeded the expenditure for improvements was immaterial, and the fact that the vendee had been compensated for the improvements by the use and income of the land, was no defense to his suit for a specific performance. This decision, in my opinion, rests firmly upon the principle which underlies the doctrine of part performance; while the few decisions which would virtually require the court, in every case, to strike a balance between the vendee's benefits and outlays, his receipts and expenditures, and decide for or against him, according to the result of the balance being unfavorable or favorable to him—these decisions lose sight of the equitable basis of confidence and reliance upon the good faith of the vendor, on which the whole theory of part performance is rested.

(1) *Lord Pengall v. Ross*, 2 Eq. Cas. Abr. 46, pl. 12; *Parkhurst v. Van Cortland*, 1 Johns. Ch. 273; *Wack v. Sorber*, 2 Whart. 387; *Heft v. McGill*, 3 Barr. 256; *Harden v. Hays*, 9 Barr. 151; *Anthony v. Leftwich*, 3 Rand. 255; *Goodwin v. Lyon*, 4 Port. (Ala.) 297. Even in North Carolina, where the entire doctrine of part performance taking a verbal contract out of the statute, has been rejected compensation is decreed to the vendee for his outlays, although he fails to obtain a performance of the agreement. *Albea v. Griffin*, 2 Dev. & Bat. Eq. 9; *Baker v. Carson*, 1 Dev. & Bat. Eq. 381; *Dunn v. Moore*, 3 Ired. Eq. 364.

(2) See *ante*, § 117.

ally the outlays must be made with the consent, express or implied, of the vendor, and this consent is not presumed from the mere fact of their being made; knowledge on his part, and the absence of objection, must at least be proved.

SEC. 130. The making of valuable improvements by a donee in possession, is also regarded by courts of equity as furnishing a sufficient ground for decreeing the specific execution of a parol gift of lands, either when the gift is made to a relative, in anticipation of marriage, in the nature of an advancement, or when it is purely charitable.(1) Possession alone is not sufficient. A parol gift of land, even from father to son, will not be enforced unless followed by possession and by valuable improvements made by the donee, or unless there are some other special facts which would render the failure to complete the donation peculiarly inequitable and unjust. This rule, however, has no connection with the statute of frauds. In order to grant its remedy of a specific execution, equity requires a valuable consideration—it never enforces a voluntary agreement. The statute of frauds is satisfied by possession as a part performance, and the general doctrines of equity demand, in addition thereto, a valuable consideration. This latter demand is answered by the outlays, expenditures, and labors of the donee in making the valuable improvements as a consequence of the gift.(2) The doctrine, therefore, has been generally accepted that, when the donee takes possession and makes outlays upon valuable and substantial improvements, in execution of the

(1) *McLain v. School Directors*, 51 Pa. St. 196.

(2) *Stewart v. Stewart*, 3 Watts, 253, 255; *Eckert v. Eckert*, 3 Penn. 332; *Eckert v. Mace*, 3 Penn. 364, n.; *Pinckard v. Pinckard*, 23 Ala. 649. In *Stewart v. Stewart*, *supra*, it was said: "To take a parol contract out of the statute, it is necessary not only that it be partly performed by delivery of the possession, but that it be on a valuable consideration paid, or secured to be paid; or, in the case of a gift, that there be an expenditure of money or labor in consequence of it, which comes to the same thing; and this for the plain reason that no equity arises from the naked delivery of the possession, and without a specific equity, a chancellor would not interfere to compel a conveyance or execution of the contract." That equity does not enforce an executory promise to make a donation, or an executory voluntary agreement to give or to create a trust, although in writing, see *estate of Webb*, 49 Cal 542, and other cases cited in section two of this chapter, on the necessity of consideration. The following are additional cases illustrating the rules stated in the text. *Galbraith v. Galbraith*, 5 Kans. 402. A verbal gift of land by father to his son, with agreement to convey upon certain conditions, was held to have been part performed by the donee's taking possession, and making permanent improvements with the donor's consent. *Neale v. Neale*, 9 Wall. 1. A son being about to marry, his father agreed verbally to convey to the intended wife a certain piece of land, and she verbally agreed to

donation, or does other analogous acts, which would render a revocation or refusal to complete inequitable, a parol gift of land will be specifically enforced, since the labor and expenditures of the donee supply a valuable consideration, while the possession and betterments constitute a part performance which obviates the statute of frauds.(1) This doctrine has been criticised in some American decisions, and wholly repudiated by others.(2)

SEC. 131. Slight and temporary improvements or trivial outlays, however, do not raise an equity in favor of the donee to have the gift enforced; nor does the court grant its specific remedy when the expenditure was not made in consequence of the gift, nor, it seems, when the donee has been compensated for his outlays by the rents

erect a house on it with her own money; the marriage took place, the possession was delivered by the father, and the daughter-in-law built the house; upon these facts the father was decreed to specifically perform his agreement by conveying the land.

(1) *Surcome v. Penniger*, 3 DeG. M. & G. 571; *Floyd v. Buckland*, 1 Freem. 268; *Ungley v. Ungley*, L. R. 4 Ch. D. 73; *Freeman v. Freeman*, 43 N. Y. 34; *Williston v. Williston*, 41 Barb. 635; *Lobdell v. Lobdell*, 36 N. Y. 327; *France v. France*, 4 Halst. Ch. 650; *Syler v. Eckhart*, 1 Binney, 378; *McClure v. McClure*, 1 Barr. 374; *Burns v. Sutherland*, 7 Barr. 103; *Eckert v. Mace*, 3 Penn. & Watts, 364, n.; *Young v. Glendenning*, 6 Watts, 509; *Mahon v. Baker*, 2 Casey, 519; *Atkinson v. Jackson*, 8 Ind. 30; *Saco v. Henry*, 39 Ind. 414; *Bright v. Bright*, 41 Ill. 101; *Galbraith v. Galbraith*, 5 Kans. 402; *Neale v. Neale*, 9 Wall. 1; *Kings v. Thompson*, 9 Pet. 204; *Haines v. Haines*, 4 Md. Ch. 133; 6 Md. 435; *Runker v. Abell*, 8 B. Mon. 566; *Kurtz v. Hibner*, 55 Ill. 514; *Johnston v. Johnston*, 19 Iowa, 74.

(2) Repudiated in *Ridley v. McNairy*, 2 Humph. 174; *Evans v. Battle*, 19 Ala. 39; *Forward v. Armstead*, 12 Ala. 124; *Pinckard v. Pinckard*, 23 Ala. 649; *Boze v. Davis*, 14 Tex. 331; questioned in *Moore v. Small*, 7 Harris, 461, 469; *Thorne v. Thorne*, 18 Ind. 462. The courts, in these decisions, seem to have wholly misapprehended the ground upon which the equitable doctrine of part performance rests. The enforcement of a part-performed contract is never based upon the *contract itself*, for that is wholly covered by the statute of frauds; it is based upon acts of the parties outside of their bargaining, acts which render the defendant's refusal to go on a clear fraud upon the plaintiff. Now, it is evident that exactly the same reasons exist, and have exactly the same cogency, in the case under discussion, of a parol gift. Its enforcement is never based upon the donor's promise; it is based upon acts done outside of and in addition to such promise; upon the donee's taking possession and making improvements on the faith and in execution of the gift, and thereby altering his own position, so that a restoration to his former situation would be impossible, and a refusal to perfect the donation by conveying the title and the consequent loss of his outlays, would be an act of glaring injustice and virtual fraud against the donee. The same equitable considerations which lead to the enforcement of a verbal agreement, must apply with like force to the enforcement of a parol gift, if a consideration has been supplied by the donee.

and profits already received from the land.(1) The gift must be established by certain and unmistakable evidence, and the fact that the improvements were made in consequence of and in reliance upon it, must also be directly and unequivocally proved; proof merely that the donee has received possession of the land, and has made improvements upon it, will raise no presumption of his purpose and intent, nor furnish a sufficient ground for the specific equitable relief.(2) If the donee, through lack of certain evidence, fails to establish the gift and to obtain its enforcement, he may, nevertheless, be reimbursed or compensated for the money and labor expended in reliance upon the donor's promise.(3)

SEC. 132. In certain states the foregoing rule, as to parol gifts, has even been extended to parol licenses. In those states, therefore, a parol license to enter upon and occupy land of the licensor, and to do acts thereon, such as constructing a way or water-course, or building a permanent structure even, if partly executed by the licensee, so that injury, which is technically called irreparable, would be caused by its revocation, will be specifically enforced. The nature of the relief will, of course, depend upon the nature of the license and the acts done under it by way of part performance. In general, the actual remedy is an injunction to prevent a revocation, and restrain the licensor from interfering with the occupation and works of the licensee.(4) This rule is undoubtedly opposed to the common-law doctrine concerning licenses as it prevails in England, and in most of the American states.

SEC. 133. 7. Although marriage, as has already been shown, is not alone a part performance of contracts made in consideration of it, yet an agreement made in consideration of marriage, or in anticipation of marriage, or a parol gift to one or both of the intended

(1) *Wack v. Sorber*, 2 Whart. 387; *Neale v. Neale*, 9 Wall. 1; *Young v. Glendenning*, 6 Watts, 509, per GIBSON, C. J.: "Slight and temporary erections for the tenant's own convenience, give no equity; but an indefeasible right may grow out of permanent improvements." The expenditures must be shown to have been made on the faith of a prior donation. *Eckert v. Eckert*, 3 Penn. 332; *West v. Flannagan*, 4 Md. 36.

(2) *Hugus v. Walker*, 2 Jones, 173.

(3) *King v. Thompson*, 9 Peters, 204; *Evans v. Battle*, 19 Ala. 398; *Boze v. Davis*, 14 Tex. 331.

(4) The proposition stated in the text is most strongly maintained by decisions of the Pennsylvania courts. *Rerick v. Kern*, 14 Serg. & R. 267; *Swartz v. Swartz*, 4 Barr. 353; *McKellip v. McIlhenny*, 4 Watts, 317; *Pope v. Henry*, 24 Vt. 560; *Sheffield v. Collier*, 3 Kelly, 82; *Wynn v. Garland*, 19 Ark. 23; 2 Am. Lead. Cas. 570 (5th ed.).

spouses where the donor receives no pecuniary consideration, will be specifically enforced, if there are other independent acts of part performance in connection with the wedlock; and the courts are, perhaps, not inclined, in such cases, to scrutinize these ancillary acts with severity, or to require that they should be in themselves of much importance.(1) Possession of the land is a sufficient act in case of an

(1) *Hammersley v. De Biel*, 12 Cl. & Fin. 64, n.; *Surcome v. Penniger*, 3 DeG. M. & G. 571; *Taylor v. Beech*, 1 Ves. 297; *Ungley v. Ungley*, L. R. 4 Ch. D. 73; *Neale v. Neale*, 9 Wall. 1; *Duval v. Getting*, 3 Gill. 138; *Gough v. Crane*, 3 Md. Ch. 119; 4 Md. 311. In *Neale v. Neale*, 9 Wall. 1, taking possession and making permanent improvements by the husband and wife, were held a sufficient part performance of an ante-nuptial verbal promise by the father of the husband, to convey land to the wife, made in consideration of the intended marriage. In *Surcome v. Penniger*, *supra*, a father, before the marriage of his daughter, told her intended husband that he should give them certain leasehold property on their marriage. After the marriage, he put the husband in possession, and told the tenants to pay their rents to the husband, who also laid out some money on the property. This, it will be seen, was a parol gift in anticipation of the marriage; the subsequent acts were held by the lord justices, a good part performance, per L. J. TURNER: "In this case, there has been a part performance by the delivery up of possession to the husband—a fact which has always been held to change the situation and rights of the parties—and there has been a considerable expenditure by him on the property. There is, therefore, here, what was wanting in *Lassence v. Tierney*, viz.: acts of part performance besides the marriage. The difficulty in these cases is, that the statute of frauds presents an obstacle to suing upon the agreement. But it has been held in many cases, that if there be a written agreement after marriage, in pursuance of a parol agreement before the marriage, this takes the case out of the statute; so does also part performance." The recent case of *Ungley v. Ungley*, *supra*, is still more emphatic. A father, in contemplation of the marriage of his daughter, verbally promised to give her a certain house as a present, and at once, after the marriage, put her and her husband in possession. The father was the owner of the premises, which were leasehold, subject to a charge in favor of a building society, payable in installments. He paid those which fell due in his life-time, and at his death there was a balance of 110*l.*, which fell due shortly after his death. Held, per MALINS, V. C., that the verbal promise having been proved, the possession was a part performance, which took the case out of the statute of frauds; that the intent of the donor was to give the house free from incumbrances, and so the 110*l.* was payable out of the personal estate of the deceased. This could hardly be called a *contract* made upon consideration of marriage, it was rather a gift in anticipation thereof; and yet possession, without the making of improvements, was held a sufficient part performance, probably because the marriage itself was to be regarded as a strengthening circumstance. In *Hammersley v. De Biel*, 12 Cl. & Fin. 64, the lady's father and her intended husband made a verbal agreement prior to the marriage, by which the father agreed to settle certain property on his daughter, and the husband agreed to settle a certain jointure upon her. The intended husband executed his settlement as he had promised, and the marriage took place. It was held by Lord Ch. COTTENHAM, that this execution of the settlement in pursuance of his contract by the husband,

agreement; possession and improvements in case of a mere parol promise or gift. Under some very special circumstances, cohabitation, even between a husband and his wife, may be an act of part performance sufficient to take a contract, in which they are both beneficially interested, out of the statute of frauds.(1)

SEC. 134. 8. The foregoing, especially possession and improvements, either alone or in connection with each other, or with payment,

being an act done by him over and above the marriage, was a sufficient part performance to take the father's verbal agreement out of the statute, and it was accordingly enforced. On appeal to the House of Lords, Lord CAMPBELL and Lord LYNCHURST were strongly of the same opinion with Lord COTTENHAM, but the decision below was actually affirmed upon another view of the case. *Hammersley v. De Biel*, 12 Cl. & Fin. 45. In the more recent case of *Warden v. Jones*, 23 Beav. 487, where the ante-nuptial verbal agreement was between the intended husband and wife alone, and not between the husband and another person, it was held by Sir John ROMILLY, M. R., that the execution of a settlement by one of the parties, was not a sufficient part performance to render the agreement binding as against the other. The distinction made by the M. R. in this case would, probably, not be accepted and followed in those American states which have so largely increased the wife's capacity to contract by various statutes, provided the doctrine of the preceding case (*Hammersley v. De Biel*) was approved and adopted. If the execution of a written instrument, like a settlement of property, is an effectual part performance of a verbal ante-nuptial agreement between one of the spouses and a third person, there can be no reason, by the modern law respecting married women which prevails in those states, why the same result should not follow in the case of a verbal ante-nuptial agreement between the two intended spouses. In *Duval v. Getting*, *supra*, a father, in contemplation of her marriage, made a verbal gift of land to his daughter; the marriage and subsequent possession by the daughter and her husband, were held to constitute a part performance. In *Gough v. Crane*, *supra*, a verbal ante-nuptial agreement was made by a woman and her intended husband, to the effect that he should be entitled absolutely to all her things in action, in consideration of a yearly allowance to be paid by him to her for pin money. At the marriage, the wife's bonds were delivered to the husband, and he afterwards paid her the pin money as agreed. After her death, this agreement was enforced against her representatives, the Maryland court of appeals holding that the delivery of possession was a good part performance. This decision has been criticised on the ground that, as the husband was entitled by law to the possession of his wife's choses in action, the fact of his possession did not indicate any contract, and therefore lacked the first essential element of a part performance. Passing by this criticism, the decision is clearly opposed to the distinction taken by the M. R. in *Warden v. Jones*, *supra*.

(1) *Webster v. Webster*, 27 L. J. Ch. 115; S. C. on app., 4 DeG. M. & G. 437. A husband and wife having separated and executed a deed of separation, he covenanted therein with her trustee to pay her a certain annuity during the separation. Shortly before his death, he verbally promised to her and her trustee, that if she would return and live with him, he would continue to pay her the annuity for her life, and would charge it upon his real estate. She, therefore, returned and cohabited with him until his death, but he did not fulfill his part of

or with marriage, are by far the most common species of part performance with which the courts are called upon to deal. It will be noticed that they operate directly upon the land or other subject-matter of the contract, and involve some physical acts on the part of the plaintiff affecting its very corpus. I shall, in the present subdivision, collect all the remaining miscellaneous instances of part performance which do not admit of a more specific classification, and many of which are entirely independent of the subject-matter of the contract. 1. A verbal agreement to exchange land, when followed by possession, is thereby part performed and will be enforced; (1) and the possession by one of the parties will take the agreement out of the statute as to the other, who has not entered into the possession of his tract. (2) It has even been held that the execution of a conveyance by one party, in pursuance of a verbal contract to exchange lands, is of itself a sufficient part performance upon which to enforce the agreement against the other party. (3) When two claimants of the same land verbally agree to compromise the controversy by dividing it between them, and the division is made, and each takes possession of his allotted portion, the bargain will be enforced at the suit of either. (4) The same rule is recognized and followed in the doctrine as to parol partitions and adjustments of boundaries heretofore stated. (5)

SEC. 135. 2. Under very special circumstances, work, labor and services done or procured to be done by a vendee for the benefit of a vendor, if they cannot be adequately compensated by an award of damages, and if the plaintiff cannot be restored to his original posi-

the agreement. After his death the agreement was enforced against the husband's devisees, the court holding the act to be a part performance. It will be noticed here, that the part performance was something which did not directly act upon or affect the land itself.

(1) *Reynolds v. Hewett*, 3 Casey, 176; *Johnston v. Johnston*, 6 Watts, 370; *Miles v. Miles*, 8 Watts & Serg. 136; *Parrill v. McKinley*, 9 Gratt. 1; *Beebe v. Dowd*, 22 Barb. 255; *Stockley v. Stockley*, 1 V. & B. 23; *Neale v. Neale*, 1 Keen, 672; *Baker v. Scott*, 2 T. & C. 605. Verbal agreement between A. & B. to exchange lands. A. conveyed to B., who took possession. *Held*, A. was thereby entitled to a specific performance against B.

(2) *Lee v. Lee*, 9 Barr, 169; *Dock v. Hart*, 7 Watts & S. 172; *Reynolds v. Hewett*, 3 Casey, 176; *Jones v. Pease*, 21 Wisc. 644.

(3) *Caldwell v. Carrington*, 9 Pet. 86. It is clear that such an act fully meets all the requirements of the doctrine.

(4) *Weed v. Terry*, 2 Doug. (Mich.) 344. See *Stapilton v. Stapilton* and notes. *Lead. Cases in Eq. v. 2.*

(5) See *ante*, § 121.

tion, will constitute part performance of an agreement to convey land in consideration of such services.(1) 3. Sometimes acts done to or by a third person, not a party to the suit, may be a part performance; but they must, of course, be contemplated by the agreement, and done in pursuance of it; and, it would seem, must materially affect both the plaintiff and the defendant. Examples of this kind are given in the foot-note.(2) Acts of ownership, done on or towards the land by

(1) *Rhodes v. Rhodes*, 3 Sandf. Ch. 279; see *ante*, § 114. This case is doubtless unusual, but I think the decision clearly conforms with the essential principles upon which the doctrine of part performance rests. The criticisms upon it exhibit the too common inability or unwillingness to understand and appreciate the effect of a *general principle*, and its application to an assemblage of facts different from those to which it is ordinarily applied. For a case, where in a contract somewhat similar to the foregoing, the part performance was held insufficient, see *Cronk v. Trumble*, 66 Ill. 428. In *Twiss v. George*, 33 Mich. 253, a step-son, on his coming of age, was about to leave home and act for himself. His step-father thereupon agreed, verbally, that if he would remain at home and work the farm, and take care of the family, he should have a deed of one-half of the farm. The evidence showed this to have been a distinct and plain agreement, and not a mere vague expectation. The step-son substantially performed on his part, and it was held that he was entitled to a specific execution of the contract.

(2) In *Johnson v. Hubbell*, 2 Stockt. Ch. 332, a father made an oral promise to a son, in presence of his daughter, to devise certain land to the son in consideration of the latter's conveying, at once, certain other land of his own to the daughter. The son thereupon executed the conveyance to his sister, and this was held to be a part performance of the father's verbal agreement to devise. In *Lee v. Lee*, 9 Barr. 169, a father and son agreed that the father should purchase for himself a certain piece of land with money of the son's, and that the son should, in return, take for himself a second tract belonging to the father. The father thereupon bought and took possession of the first parcel, and the second was assessed in the son's name, although he did not take possession of it. The act of the father in buying and taking possession of the first parcel, with the assessment of the second to the son (which fact, however, of itself, could have had little or no effect), was held to be a part performance, and took the father's verbal agreement to convey the second parcel out of the statute. In this case, it is true, no act was done to or by a third person; but at the same time the act constituting the part performance had no direct connection with the land which was the subject-matter of the contract sought to be enforced. In *Crocker v. Higgins*, 7 Conn. 342, an agreement was made between A., B., and C., whereby it was stipulated that if A. would convey certain land to B., he (B.) would lease the same to C. A. conveyed to B., and this was held a part performance upon which B.'s undertaking to lease could be enforced on behalf of C. In *Parker v. Smith*, 1 Coll. C. C. 608, the owner of a colliery had leased to four partners for a term of years, which had yet several years to run. He made a verbal agreement with the lessees, in substance, that the firm should dissolve; that two of them should retire and give up all interest in the business, which should be thereafter conducted by the other two, they assuming all the existing liabilities, and he would thereupon give these two partners a new lease at a diminished rent. The firm was therefore dissolved, by the two specified members retiring; the other two assumed all the liabilities, and



or on behalf of the vendee, do not always *per se* amount to a part performance. Thus, if a purchaser under a verbal contract does not take possession, nor make the requisite kind of improvements, the assessment of the land to him and his paying taxes on it, will not be suffi-

released the out-going members therefrom, and carried on the business by themselves. These acts between the two who went out and the two who continued, whereby the firm was dissolved, and the liabilities of the latter were increased, were held to constitute a part performance, and the verbal agreement to give a new lease was enforced. The decision has often been cited with approval. On the other hand, when the vendee, in a verbal contract for the purchase of land, has stipulated as a part of the agreement to lease the premises to a third person, his executing the lease is held not to be a part performance. *Whitchurch v. Bevis*, 2 Bro. C. C. 559. And where the vendor verbally agreed to convey, upon the vendee's procuring a release from a third party, and the vendee procured the release by paying a large sum for it, this act was held not to be a part performance. *O'Reilly v. Thompson*, 2 Cox, 271. This case was explained by V. C. KNIGHT BRUCE, in *Parker v. Smith*, *supra*, and distinguished on two grounds: *First*, the procuring the release was not done in execution of the agreement, but preparatory to and in anticipation of its performance; and *secondly*, it was not between the parties to the agreement. The same observation applies to *Whitchurch v. Bevis*. Again, a contract between A. and B., that if B. would convey to C., A. will convey to B.; B. executes the conveyance to C.; this has been held not to be a part performance, so as to entitle B. to a decree against A. *Chambers v. Lecompte*, 9 Mo 566. It may seem difficult to reconcile all these cases. I think, however, that the following rule may fairly be deduced from them, and that it removes any apparent conflict, although it is impossible to say that it has been explicitly laid down by the court in each case. If the act done to or by the third person is one in which either one of the parties to the suit has no interest—in other words, if it is one by which either one of these parties will not be materially affected, then it will not constitute a part performance of their agreement, although one of them is interested in it. Thus, in the case last cited, A. had no interest in the transfer of B.'s land to C; in *Whitchurch v. Bevis*, the vendor had no interest in the lease made by the vendee to a third person; and in *O'Reilly v. Thompson*, it would seem the vendor had no interest in the release procured by the vendee, although in all these three cases the vendee himself had a very material interest in the act done by himself, or which he procured to be done by the third person. If, on the other hand, the act is contemplated by the agreement, done in pursuance of it, and is one in which both parties to the suit have an interest, it will avail as a part performance in behalf of the plaintiff against the defendant. Thus, in *Parker v. Smith*, both the lessor and the two remaining partners who were parties to the suit, had a material interest in the dissolution of the partnership, and the assumption of all liabilities by the plaintiff. In *Croker v. Higgins*, which slightly resembles *Whitchurch v. Bevis*, there is the essential difference, that all three persons were parties to the agreement, although only two of them were parties to the suit; and furthermore, both defendant B. (who had promised to lease the land to C.), and the plaintiff C. were, by the very terms of their tripartite agreement, interested in the conveyance from A. to B., which constituted the part performance. In *Johnson v. Hubbell*, the father was interested in the conveyance by his son to his daughter, because it was a means of providing for her, and in fact took the place of a devise or bequest; in this respect, the case differs

cient;(1) nor, as has been held in Pennsylvania, will the cutting of timber over it, or other analogous use, even when it is uncultivated timber land, which is not ordinarily possessed in any other manner.(2) This latter decision should, perhaps, be referred to the known dislike of the Pennsylvania courts to the entire theory of part performance, and it can hardly be taken as an authority on the doctrine as generally maintained.(3)

SEC. 136. *Fourth. The nature and effect of the evidence by which the contract must be proved.*—In order that a court of equity shall exercise its power to decree a specific execution, where there has been a part performance, the contract itself must be clear, certain, and unambiguous in its terms, and must either be admitted by the pleadings, or proved, with a reasonable degree of certainty, to the satisfaction of the court. If, therefore, upon all the evidence given by both parties, the court is left in doubt as to the entire contract, or even as to any of its material terms, it will not grant the remedy, although a partial performance of something has been sufficiently proved.(4) It has

from *Chambers v. Lecompte*, which it would exactly resemble if the parties had been strangers. The principle suggested seems to reconcile all these cases, and also seems to be sound.

(1) *Christy v. Barnhart*, 14 Pa. St. 260.

(2) *Gangwer v. Fry*, 17 Pa. St. 491.

(3) *Miller v. Ball*, 64 N. Y. 286; *Borritt v. Gomeserra*, Bunb. 94.

(4) *Lindsay v. Lynch*, 2 Sch. & Lef. 1; *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Symondson v. Tweed*, Prec. Ch. 324; *Foster v. Hale*, 3 Ves. 712, 713; *Boardman v. Mostyn*, 6 Ves. 467, 470; *Pilling v. Armitage*, 12 Ves. 78; *Mortimer v. Orchard*, 2 Ves. 243; *Savage v. Carroll*, 1 Ball & B. 265, 551; 2 Ball & B. 451; *Toole v. Medicott*, 1 Ball & B. 404; *Reynolds v. Waring*, You. 346; *Reese v. Reese*, 41 Md. 554; *Townsend v. Hawkins*, 45 Mo. 286; *Twiss v. George*, 33 Mich. 253; *Ackerman v. Ackerman*, 24 N. J. Eq. 315; *Semmes v. Worthington*, 38 Md. 298; *Long v. Duncan*, 10 Kans. 294; *Hardesty v. Richardson*, 44 Md. 617; *Lester v. Kinne*, 37 Conn. 9; *Huff v. Shepard*, 58 Mo. 242; *Allen v. Webb*, 64 Ill. 342; *Wright v. Wright*, 31 Mich. 380; *Blanchard v. Detroit, etc., R. R.*, 31 Mich. 44; *Newton v. Swazey*, 8 N. H. 9, 13; *Tilton v. Tilton*, 9 N. H. 386, 391; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273, 284; 14 Johns. 15; *Phillips v. Thompson*, 1 Johns. Ch. 131; *German v. Machin*, 6 Paige, 288, 292; *Lobdell v. Lobdell*, 36 N. Y. 327; *Wallace v. Brown*, 2 Stockt. Ch. 308, 311; *Eyre v. Eyre*, 4 Green Ch. 102; *Petrick v. Ashcroft*, 4 ib. 339; *Force v. Dutcher*, 3 Green. Ch. 401; *Brewer v. Wilson*, 2 C. E. Green, 180; *Brown v. Finney*, 3 P. F. Smith, 373; *Sage v. McGuire*, 4 Watts & S. 223, 229; *Charnley v. Hansbury*, 1 Harris, 16, 21; *Moore v. Small*, 7 Harris, 461, 470; *Rankin v. Simpson*, 7 Harris, 471; *McCue v. Johnston*, 1 Casey, 306; *Cox v. Cox*, 2 Casey, 375; *Frye v. Shepler*, 7 Barr. 91; *Greenlee v. Greenlee*, 22 Pa. St. 225; *Burns v. Sutherland*, 7 Barr. 103; *Hugus v. Walker*, 2 Jones, 173; *Shepherd v. Bevin*, 9 Gill. 32; *Owings v. Baldwin*, 1 Md. Ch. 120; *Shepherd v. Shepherd*, 1 Md. Ch. 244; *Beard v. Linthicum*, 1 Md. Ch. 345; *Chesapeake and Ohio Canal Co. v. Young*, 3 Md. 480; *Wingate v. Dail*, 2

been said, in some American decisions, that in suits upon contracts for the purchase or sale of land, the location and boundaries of the land in question must be clearly defined in the contract, and established by the evidence; and though the parties have agreed as to all other terms, if they have not as to these particulars, there is no contract which can be enforced. (1) The mode of describing parcels of land is so different in English conveyances from that ordinarily employed in this country, that the English decisions upon this particular point can have little application in the United States. It may safely be said, however, that the rule which generally prevails, only requires that the land intended to be affected by the contract should be so described, that it may be unmistakably identified by the evidence. Certainly no more certain or detailed description can be required in a contract for the sale of land than in a deed by which it is conveyed.

SEC. 137. It is not necessary that the contract should be proved with that degree of moral certainty what is technically termed "beyond a reasonable doubt;" and mere conflict of evidence is not, of itself, a ground for refusing to grant the remedy. It is sufficient if the sub-

Harr. & J. 76; Stoddert v. Tuck, 5 Md. 18; Carlisle v. Fleming, 1 Harring. 421, 431; Townsend v. Houston, 1 Harring. 532, 545; Anthony v. Leftwich, 3 Randolph, 238, 246; Rowton v. Rowton, 1 Hen. & Munf. 91; Church of the Advent v. Farrow, 7 Rich. Eq. 378; Thompson v. Scott, 1 McCord Ch. 32, 38, 39; Massey v. McIlwain, 2 Hill Ch. 421, 426; Hatcher v. Hatcher, 1 McMullen Eq. 311, 315; Miller v. Cotten, 5 Geo. 341, 351; Printup v. Mitchell, 17 Geo. 558; Goodwin v. Lyon, 4 Port. (Ala.) 297; Kay v. Curd, 6 B. Mon. 100; Shirley v. Spencer, 4 Gilman (Ill.), 583-601; Minturn v. Baylis, 33 Cal. 129; Colson v. Thompson, 2 Wheat. 336, 341; Purcell v. Miner, 4 Wall. 513; McNeill v. Jones, 21 Ark. 277; Shropshire v. Brown, 45 Geo. 175. In Mortimer v. Orchard, 2 Ves. 243, *supra*, the bill alleged one agreement, the plaintiff's only witness proved a different one, while the defendants, in their answer, admitted a third. Lord Rosslyn, although decreeing a specific performance of the agreement as admitted in the answer, because of the large expenditure made, said that, in strictness, the plaintiff's bill ought to have been dismissed. In Reynolds v. Waring, Younge, 346, *supra*, the evidence for the plaintiff consisted of the testimony of one witness, and of a memorandum of the contract made in a pocket-book, and produced. The witness stated the price to be 1,000 guineas, *exclusive of the timber*, while the memorandum contained no mention of the timber. This variation left the material terms as to the price in complete uncertainty, and the bill was dismissed. The rule was laid down very rigidly in the late case of Cox v. Cox, 2 Casey, 375, *supra*, in which the court said: "The plaintiff must state his case as he means to prove it, and then prove it as it has been stated; and he cannot allege different or inconsistent stipulations or agreements, and then leave the court to decide which is substantiated by the evidence."

(1) Robertson v. Robertson, 9 Watts. 32, 42; Woods v. Farmare, 10 Watts, 195, 205, 207; Moore v. Small, 7 Harris, 461, 470; Camden & Amboy R. R. v. Stewart, 3 C. E. Green, 489.

ject-matter and all the material terms of the contract can be determined with reasonable certainty from all the evidence; if the judge can ascertain, from all the proofs, what the contract really is, he must decree its execution, and in the words of Lord COTTENHAM, he "will endeavor to collect, if he can, what the terms of it really were." It is plainly the habit of the English courts, when a part performance has been fully made out, to establish the contract, if it can possibly be done, although the evidence may be quite conflicting, and even uncertain.<sup>(1)</sup> There are certain instances in which a clear and distinct variation between the contract as alleged by the party, and that proved by him—not merely a vagueness or doubt as to any of its terms arising from uncertain or conflicting evidence—will not prevent the court from granting him the relief, if the agreement is otherwise sufficiently established. These instances are: 1. Where the plaintiff's allegation is the statement of some term operative against himself, which his evidence fails to prove; or is the omission of some term favorable to himself, which his evidence *does* make out. Under such circumstances, the defendant would have no ground for objecting,

(1) *Mundy v. Jolliffe*, 5 My. & Cr. 167, 177; *East India Co. v. Nuthumbadoo Veerasawmy Moodelly*, 7 Moo. P. C. C. 482; *Laird v. Birkenhead Ry. Co.*, Johns. 500; *Wilson v. West Hartlepool Ry. Co.*, 10 Jur. (N. S.) 1065; 11 Jur. (N. S.) 124; 34 Beav. 187; 2 DeG. J. & S. 475; *Oxford v. Provand*, L. R. 2 P. C. 135, 148; *Baumann v. James*, L. R. 3 Ch. 508; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279, 281; *Parkhurst v. Van Cortlandt*, 11 Johns. 15, 37; *Burns v. Sutherland*, 7 Barr. 103, 106; *Hooper v. Laney*, 39 Ala. 338; *Long v. Duncan*, 10 Kans. 294. In *Mundy v. Jolliffe*, *supra*, Lord COTTENHAM said: "Courts of equity exercise their jurisdiction in decreeing specific performance of verbal agreements, when there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the statute of frauds, after the other party to the contract has, upon the faith of such engagement, expended his money, or otherwise acted in execution of the agreement. Under such circumstances, the court will struggle to prevent such injustice from being effected; and with that object it has, at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavored to collect, if it can, what the terms of it really were." And in *East India Co. v. Nuthumbadoo Veerasawmy Moodelly*, *supra*, Sir George TURNER, L. J., said: "There are cases in which the court will go to a great extent in order to do justice between the parties, where possession has been taken, and there is an uncertainty about the terms of the contract." In one very old case Lord Chancellor JEFFRIES really made a contract for the parties where none had been proved. *Anon.*, 5 Ven. Abr. 523, pl. 40; but this case, of course, goes far beyond the rule as now well established. For cases illustrating the old chancery practice of ordering a special "inquiry" before a master, when the evidence at the hearing was insufficient, see *Boardman v. Mostyn*, 6 Ves. 470; *Allan v. Bower*, 3 Bro. C. C. 149; *Clinan v. Cook*, 1 Sch. & Lef. 22; *Savage v. Carroll*, 1 Ball. & B. 265, 550, 551; *Storey Eq. Jur.* § 764.

and the decree would, of course, conform to the contract as averred, unless the plaintiff was permitted to amend his pleading.(1) 2. Where the variation is not material, which happens when it consists in the addition of a term which would necessarily be implied from the averments, or in the omission of a term which has actually been performed (2) If the agreement, as alleged by the plaintiff, is admitted by the defendant in his answer, no other proof of it is necessary. This is so, even when the statute of frauds is expressly set up as a defense, provided there has been a part performance, for the part performance obviates the statute, and the only issue thus presented by the pleadings for trial, is whether the agreement, as admitted, has been part performed.(3)

SEC. 138. Where parties have entered into a written agreement, and have then added to or varied its terms by parol—or in other words, where the whole agreement is partly written and partly verbal—and there has been a part performance of the parol portion, the rule is settled in England, that the entire contract, the writing, with the parol variation of it, will be specifically enforced. It is said that the familiar doctrine which forbids the variation of a written agreement by parol evidence, does not apply to such a case; that part performance would permit the whole contract to be proved by parol evidence, and *a fortiori*, a portion of it may be thus made out.(4) Such additional verbal terms or verbal variations of the written agreement must, however, have been so far carried into effect or executed, as to bring them within the doctrines of part performance, which guide a court of equity in specifically enforcing all parol contracts.(5)

(1) *Clifford v. Turrell*, 1 Y. & C. C. C. 138; *Gregory v. Mighell*, 18 Ves. 328; *Mundy v. Jolliffe*, 5 My. & Cr. 167. In *Gregory v. Mighell*, the plaintiff, a tenant, alleged a contract by which, among other things, he was to pay taxes and do necessary repairs; but his evidence was silent in respect to this onerous term. In *Mundy v. Jolliffe*, the plaintiff, also a lessee, averred a contract by which, among other things, he was required to drain the lands *generally*, and was to turn certain arable land into pasture; but his proof only showed that he was to drain *where necessary*, and omitted all mention of the other particulars. It should be observed that the rule stated in the text is based upon the fact that the plaintiff cannot take advantage of the *evidence* in his favor, but must abide by the allegations of his pleading, which are more unfavorable to him than the evidence is.

(2) *Lucas v. James*, 7 Hare, 410, 424. See *ante*, § 64, as to immaterial variations between a proposal and an acceptance. The same doctrine must apply to like variations between the contract as alleged, and that as proved.

(3) *Cooth v. Jackson*, 6 Ves. 12.

(4) *Anon.*, 5 Vin. Abr. 522, pl. 38; *Sutherland v. Briggs*, 1 Hare, 26, 35.

(5) *Espy v. Anderson*, 2 Harris, 308; *McCorkle v. Brown*, 9 Smedes & Marshall, 167. See the discussion of this subject at large, *post*, in section xiii, §§ 246–258.

It has been held that where the original agreement is written, and the parties have made verbal additions or variations, the plaintiff cannot prove them unless he shows a part performance, referable solely to them, and which would not have been done under the original agreement.(1) By some of the American decisions the ordinary rule against adding to or modifying a written contract is applied to this class of cases, and a parol variation of an agreement in writing, is not admitted to be proved by the plaintiff, even when part performed, unless the element of fraud or mistake is present, which always furnishes a ground for the interposition of equity. According to this restricted view, when a written contract is accompanied or followed by verbal additions or variations of such a nature, or under such circumstances that it would be a fraud upon the plaintiff if he were held to the writing alone, and these parol stipulations have been part performed, the whole agreement is treated as though it were unwritten; the plaintiff may introduce parol evidence to establish the actual contract, and the court will specifically enforce it as established.(2) A mistake in the written agreement will produce the same effect as fraud upon this theory.(3)

SEC. 139. According to the doctrine of a few early cases, where the parties expressly stipulated that their agreement should be reduced to writing, the case was not covered by the statute of frauds, although the stipulation was not carried into effect.(4) This, however, is not the law. It is now well settled that the failure to execute a written contract according to the original intention of the parties, in order to obviate the prohibition of the statute, must have been caused by the defendant's actual fraud, or by a clear mistake, or by an accident.(5)

(1) *Price v. Dyer*, 17 Ves. 253-364; *Stevens v. Cooper*, 1 Johns. Ch. 425. 430; *Espy v. Anderson*, 2 Harris, 308; *McCorkle v. Brown*, 9 Sm. & Mar. 167.

(2) *Phyfe v. Wardell*, 2 Edw. Ch. 47, 50, 51; *Parkhurst v. Van Cortlandt*, 14 Johns. 15; *Coles v. Bowne*, 10 Paige, 527, 535; *Dock v. Hart*, 7 Watts & Serg. 172; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 274, 283; *Dwight v. Pomeroy*, 17 Mass. 303, 328; *Brooks v. Wheelock*, 11 Pick. 439, 440; *Heth's Ex'or v. Wooldridge's Ex'or*, 6 Rand. 605, 610; *Kay v. Curd*, 6 B. Mon. 100, 103.

(3) *Tilton v. Tilton*, 9 N. H. 283, 392; *Philpott v. Elliott*, 4 Md. Ch. 273. See, for a fuller examination of these questions, section xiii, §§ 246-262.

(4) *Hollis v. Whiting*, 1 Vern. 151, 159; *Leak v. Morrice*, 2 Ch. Cas. 135. See the recent case of *Wolford v. Herrington*, 24 P. F. Smith, 311, which seems, in part at least, to maintain the same doctrine.

(5) *Whitchurch v. Bevis*, 2 Bro. C. C. 565, per Lord THURLOW; *Finucane v. Kearney*, 1 Freeman, 65, 69; *Bernard v. Flinn*, 8 Ired. 204; *Glass v. Hulbert*, 102 Mass. 24, 39. A false representation of the contents or effect of a written instrument may be ground for a reformation, although within the statute of frauds, since the statute shall not be used to sustain a fraud. *Tyson v. Passmore*,

The case, therefore, does not fall under the principles of part performance, but belongs to an entirely distinct head, which will be discussed in succeeding paragraphs.(1) When the plaintiff alleges an agreement, and the defendant states a somewhat different one in his answer, which is sustained by the evidence, while the acts of part performance are sufficiently applicable to both, the question arises, whether the plaintiff must fail in his suit, or whether he is entitled to a decree enforcing the agreement admitted by the defendant to have been made. If the variation was slight and immaterial, an amendment would, by the present practice, be allowed as a matter of course upon the trial. If the variation was considerable and really material, an amendment, upon terms, would be granted, according to the reformed procedure, as his suit is only to be dismissed when there is a complete failure of proof to maintain the cause of action alleged. The decisions, under the old chancery practice, leave the question above

2 Barr. 122; *Lincoln v. Wright*, 4 DeG. & J. 16, 20, 22; *Taylor v. Luther*, 2 Sumner, 229, 232. But the mere violation of a promise is not a fraud, unless the promise itself was originally made with a fraudulent intent. *Montacute v. Maxwell*, 1 P. Wms. 618; *Batturs v. Sellers*, 6 Har. & Johns. 249; *Lambert v. Watson*, 6 Har. & J. 252; *Wilson v. Watts*, 9 Md. 436; *Walker v. Hill*, 6 C. E. Green, 191; *Glass v. Hulbert*, 102 Mass. 24, 39; *Purcell v. Miner*, 4 Wall. 513. This doctrine has been applied in some of the decisions, both when the promise extends to the whole agreement, and when it extends only to some stipulation or term which has been omitted under a parol agreement that it shall be as binding as though inserted; and the suit is brought, and the attempt is made to add it to the written contract, or to treat the writing as though the verbal term was part of it. *Glass v. Hulbert*; *Batturs v. Sellers*; *Wilson v. Watts*; *Walker v. Hill*, *supra*. In *Wilson v. Watts*, the doctrine was thus laid down: "Where there is a written contract in relation to land, and some of the terms or provisions in the verbal agreement of the parties are not included in the writing, but omitted by design, even on the express understanding that such provisions shall be carried into effect in the same manner as if they constituted part of the written instrument, if there is no fraud, undue influence, surprise or mistake, either in the making of such contract, or in the reducing it to writing, parol evidence will not be admitted to enforce the omitted provisions, or for the purpose of contradicting, adding to, or varying the written instrument, although subsequently to its execution, one of the parties has fraudulently refused to comply with the omitted provisions, and in open violation of good faith and fair dealing, insists upon his right, under the statute of frauds, to have the contract, as written, carried into effect." So far as the doctrine of these decisions would require that the writing should be obligatory and enforced, although it does not contain all the terms of the agreement, although some of the terms have been purposely omitted, it cannot be reconciled with many other cases, nor, in my opinion, with the principle that the memorandum must contain *all* the material terms upon which the parties have agreed. See, for example, *Jervis v. Berridge*, L. R. 8 Ch. 351, the facts of which are given, *ante*, § 91.

(1) See *post*, §§ 246-262.

suggested in some doubt. The general rule was settled, that a contract admitted by the defendant must be substantially the same with that alleged in the bill, in order that the plaintiff can avail himself of such admission.(1) The court has, however, in the condition of the pleadings and proofs described, granted relief to the plaintiff, by decreeing performance of the contract as admitted by the defendant.(2) On the other hand, this mode of proceeding has been disapproved, and very decidedly, by Lord REDESDALE, who held that the acts of part performance could only be applied to the very contract set up by the plaintiff, and it alone could be enforced.(3) The rule to be deduced from the more modern American authorities, is that the court, in such a case, has a discretionary power to enforce the agreement alleged by the defendant, without driving the plaintiff to another action, but is not bound to do so; and this conclusion is certainly in complete harmony with the theory and provisions of the reformed codes of procedure, adopted in a large number of the states.(4)

SEC. 140. *Admission of the contract by the defendant's answer.*—In addition to part performance there are two other causes which operate to take a verbal contract out of the statute of frauds—or, to speak more accurately, which furnish a ground on which a court of equity will specifically enforce such a contract, notwithstanding the statute. These two conditions I now proceed to discuss.

When a verbal contract is alleged by the plaintiff, and the defendant admits it in his answer, without, at the same time, interposing the statute of frauds as a defense in his pleading, such contract will be established and enforced by the decree of the court; no evidence is necessary to prove it, and no part performance is requisite.(5)

(1) *Legal v. Miller*, 2 Ves. Sen. 299; *Leigh v. Haverfield*, 5 Ves. 452; *Willis v. Evans*, 2 Ball & B. 228; *Lindsay v. Lynch*, 2 Sch. & Lef. 1; *Harris v. Knickerbacker*, 5 Wend. 638.

(2) As in *Mortimer v. Orchard*, 2 Ves. 243, heretofore cited, Lord LOUGHBOROUGH said, that though, in strictness, the bill ought to be dismissed, yet, as there had been part performance of some agreement between the parties, and that set up by defendants was established by a strong preponderance of evidence, he would order it to be enforced; but he required plaintiff to pay the costs.

(3) *Lindsay v. Lynch*, 2 Sch. & L. 1; and see *Willis v. Evans*, 2 Ball & B. 228; *Harris v. Knickerbacker*, 5 Wend. 638.

(4) See cases cited *post*, under §§ 252–258.

(5) *Gunta v. Halsey*, Amb. 586; *Simondson v. Tweed*, Gilb. 35; *Rondeau v. Wyatt*, 2 H. Bl. 68, per Lord ROSSLYN; *Att'y-Gen. v. Day*, 1 Ves. Sen. 221; *Lacon v. Mertins*, 3 Atk. 3; *Collington v. Fletcher*, 2 Atk. 155; *Crayston v. Banes*, 1 Eq. Cas. Abr. 19; *Prec. Ch.* 203; *Child v. Godolphin*, 1 Dick. 39; *Whitchurch v. Bevis*, 2 Bro. C. C. 566, 567; *Spurriur v. Fitzgerald*, 6 Ves. 548, 555; *Cooth v. Jackson*, 6 Ves. 12; *Att'y-Gen. v. Sitwell*, 1 Y. & C. Exch. 583; *Newton v.*



Although this rule is firmly established, the cases and text-writers are not agreed as to the reasons for its adoption. Three principal ones have been suggested: *First*. It has been said that such an admission by the defendant obviates all the dangers which the statute was intended to prevent; that the object of the legislature was to remove all the opportunity and occasion for frauds and perjuries which are furnished by mere parol testimony, and the written statements by both the parties in their pleadings as to the terms of their agreement, leave no possible room for any fraud or perjury.(1) *Secondly*, it has been suggested, and especially by Judge STORY, that the answer signed by the defendant, or by his attorney, and admitting the contract as set forth by the plaintiff, technically and literally satisfies the very demands of the statute, since it is a note or memorandum in writing signed by the party to be charged, or by his agent duly authorized.(2) *Thirdly*, it is argued that an admission of the con-

Swazey, 8 N. H. 9, 13; Tilton v. Tilton, 9 N. H. 386, 389; Harris v. Knickerbacker, 5 Wend. 638; Cozine v. Graham, 2 Paige, 178, 181; Vaupell v. Woodward, 2 Sandf. Ch. 143, 144; Jervis v. Smith, Hoff. Ch. 470, 476; Chetwood v. Brittain, 1 Green Ch. 430; Dean v. Dean, 1 Stockt. Ch. 425; Houser v. Lamont, 55 Pa. St. 311; Artz v. Grove, 21 Md. 456; Albert v. Ware, 2 Md. Ch. 169; 6 M.l. 66; Hall v. Hall, 1 Gill, 383, 386; Argenbright v. Campbell, 3 Hen. & Munf. 141; Hollingshead v. McKenzie, 8 Geo. 457; Kirksey v. Kirksey, 30 Geo. 156; Patterson v. Ware, 10 Ala. 445, 447; Baker v. Hollobough, 15 Ark. 322; Garner v. Shebblefield, 5 Tex. 553; Sneed v. Bradley, 4 Sneed, 301; Woods v. Dille, 11 Ohio, 455; Minus v. Morse, 15 Ohio, 563, 571; Switzer v. Skiles, 3 Gilm. (Ill.) 529, 534; Tartleton v. Vietes, 1 Gilm. (Ill.) 470, 473; Dyer v. Martin, 4 Scam. (Ill.) 146; Thornton v. Henry's Heirs, 2 Scam. 219, 220; Esmay v. Grotser, 18 Ill. 483; McGowan v. West, 7 Mo. 569; Burt v. Wilson, 28 Cal. 132. In Ridgway v. Wharton, 3 De Gex, M. & G. 689; 6 House of L. Cases, 238, Lord Chancellor CRANWORTH said, that "when a defendant, by answer, admits an agreement, if he means to rely on the fact of it not being in writing and signed, and so being invalid by reason of the statute of frauds, he must say so; otherwise he is taken to mean that the admitted agreement was a written agreement, good under the statute, or else that on some other ground it was binding on him." This rule is carried so far, at all events in England, that in Skinner v. McDouall, 2 De G. & Sm. 255, where the defendant, in his answer, alleged that no formal note of the agreement was made, and denied that any binding agreement ever existed, but did not expressly claim the benefit of the statute of frauds, V. C. KNIGHT BRUCE held, at the hearing, that he was not entitled to the benefit of the statute. See Hays v. Actley, 4 De G. J. & S. 34; 12 W. R. 64. In Sneed v. Bradley, 4 Sneed (Tenn.), 301, it was held that only the parties to a contract, and those claiming under them, as heirs or purchasers, have the right to set up the statute as a defense; that a general creditor or subsequent judgment-creditor cannot avail himself of it.

(1) See Rondeau v. Wyatt, 2 H. Bl. 68, per Lord ROSSLYN, and cases cited under the preceding note.

(2) Story on Eq. Jur., § 755.

tract, without at the same time setting up its invalidity or the impossibility of enforcing it resulting from the statute, is a deliberate and formal waiver of all benefit which the defendant might have derived from the legislation—this benefit being personal, and therefore capable of being waived.(1) Both the first and second of these reasons are open to an objection fatal to each of them. If sound, they should apply with equal force to the case where the defendant sets up and relies on the statute after admitting the contract, and to that where he does not set up the statute. If an admission of the agreement obviates the dangers of perjury, or constitutes itself a memorandum, this would be none the less true if the defendant should add to such admission a plea of the statute as a defense. The rule cannot be accounted for on either of these grounds; its explanation must be found in the third reason, which alone is consistent with other doctrines. In some cases it has been held that where the defendant merely makes default by not answering, and the bill is thus taken *pro confesso*, the contract, as alleged by the plaintiff, is thereby admitted, and the requirements of the statute are obviated.(2) This particular rule, however, is not in accordance with the procedure prevailing in New York and many other states, which requires, where default is made in such kind of actions, the plaintiff to prove a *prima facie* case as alleged by legal evidence satisfactory to the court.

SEC. 141. Where an admission has been thus made by the defendant its effect is permanent, and is not confined to the issue raised by those identical pleadings. If, therefore, after having made such admission, the defendant should die before decree, the effect would extend to and bind his heirs or personal representatives, and the contract could be enforced against them in the suit revived for that purpose.(3) And after admitting the contract the defendant cannot, in

(1) See cases cited or referred in last note but one.

(2) *Newton v. Swazey*, 8 N. H. 9; *Whiting v. Gould*, 2 Wisc. 552; *Esmay v. Gorton*, 18 Ill. 483; *James v. Rice*, 1 Kay Ch. 23.

(3) *Atty.-Gen. v. Day*, 1 Ves. Sen. 218, 221; *Lacon v. Mertins*, 3 Atk. 3. It was held in early cases that where a vendor dies, and a bill is filed by his personal representatives against his heir and the purchaser, an admission by the purchaser would bind not only himself but also the vendor's heir. *Lacon v. Mertins*, 3 Atk. 1; *Potter v. Potter*, 1 Ves. Sen. 437. This doctrine has been abandoned. In order that either the heir, or the personal representative of a deceased party, may be able to enforce the contract against the other, the deceased at the time of his death must have been legally bound to perform the contract; although either his personal representative or his heir may be willing to abide by the agreement, in the absence of any binding quality, the other can take any objection which the deceased contractor might have taken had he been living. *Buckmaster v. Harrop*, 7 Ves. 341; 13 Ves. 456.

his answer to an amended bill or complaint filed by the plaintiff, withdraw such admission and set up the statute as a defense.(1) On the other hand, the rule is equally well established, both in England and in this country, that the defendant, although admitting in his answer the parol agreement charged in the bill or complaint, may at the same time insist upon its want of conformity with the requirements of the statute of frauds, and such defense will constitute a complete bar to a decree in favor of the plaintiff, unless he can show a part performance in conformity with the principles hereinbefore stated.(2)

SEC. 142. *Where a compliance with the statute has been prevented by actual fraud.*—It was stated in section 140 that, in addition to part performance, there are two other causes which furnish a ground for the enforcement in equity of a verbal contract notwithstanding the statute of frauds. One of these has just been considered, and I now proceed to treat of the other. It is the case of actual, positive fraud. It is a familiar and thoroughly established doctrine of equity, that the statute which was enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it, in the perpetration of a fraud, or in the consummation of a fraudulent scheme.(3) The principle was clearly stated by Lord ELDON, as follows: "Upon the statute of frauds, though declaring that interests shall not be bound except by writing, cases in this court are perfectly familiar, deciding that a fraudulent use shall not be made of that statute; where this court has interfered against a party meaning to make it an instrument of fraud, and said that he should not take advantage of his own fraud, even though the statute has declared that, in case those circumstances do not exist, the instrument shall be absolutely void. One instance, in the case of instructions upon a treaty of marriage—the conveyance being absolute, but subject to an agreement for a defeasance—which, though not

(1) *Spurrier v. Fitzgerald*, 6 Ves. 548. This doctrine has been extended to the case when defendant in his answer confessed a contract, and the plaintiff, with leave of the court, amended his bill so as to allege the agreement thus admitted; defendant was not permitted to retract his admission and interpose the statute as a defense. *Patterson v. Ware*, 10 Ala. 444.

(2) *Moore v. Edwards*, 4 Ves. 23; *Cooth v. Jackson*, 6 Ves. 12; *Rowe v. Teed*, 15 Ves. 375; *Blagden v. Bradbear*, 12 Ves. 471; *Stearns v. Hubbard*, 8 Greenl. 320; *Harris v. Knickerbacker*, 5 Wend. 638; *Barnes v. Teague*, 1 Jones Eq. 277; *Van Dyne v. Vreeland*, 1 Beasley, 142, 150; *Ash v. Daggy*, 6 Ind. 259; *Sneed v. Bradley*, 4 Sneed, 301.

(3) See cases cited *ante*, under §§ 71, 103; *Willink v. Vanderveer*, 1 Barb. 599; *Miller v. Cotten*, 5 Geo. 346; *Shields v. Trammell*, 19 Ark. 51; *Trapnall v. Brown*, 19 Ark. 39.

appearing by the contents of the conveyance, can be proved *aliunde*; and there are many other instances.”(1) It is important, however, to obtain a correct notion of this doctrine, and to ascertain exactly the kind of fraud against which equity will thus relieve. The moral wrong in refusing to be bound by a verbal agreement, because it does not comply with the statute, is not the fraud intended by this equitable principle; if it were, the statute would be rendered entirely nugatory. There must be some positive act of contrivance, deceit, false representation, or concealment on the part of the defendant, by which the plaintiff is prevented from insisting upon or obtaining a written contract, or is induced to accept or rely upon a parol agreement in place of that required by the statute. In other words, the failure to comply with the statute must be the result of the defendant’s fraudulent procurement, independent of the mere fact that the statute is not complied with. This distinction and the true theory were well stated in an early case by Lord MACCLESFIELD; the defendant being about to marry, having verbally promised to his intended wife that she should enjoy all her own estate to her own separate use after the marriage, which promise being made in consideration of marriage, was directly within the statute. In a suit to enforce the agreement, the lord chancellor said: “In cases of fraud, equity should relieve, even against the words of the statute, as if an agreement in writing should be proposed and drawn, and another should be fraudulently and secretly brought in and executed in lieu of the former; in this, and such like cases of fraud, equity would relieve; but where there was no fraud, only a relying upon the honor, word, or promise of the defendant, the statute making those promises void, equity will not interfere.”(2)

(1) *Mestaer v. Gillespie*, 11 Ves. 627, 628, per Ld. ELDON. The doctrine is well illustrated by the recent case of *Haigh v. Kaye*, L. R. 7 Ch. 469, which was a suit to compel a conveyance of certain land. Plaintiff had conveyed his land to the defendant without any actual consideration, by a deed absolute on its face, but with a verbal agreement that defendant should reconvey on demand. Defendant, in his answer, admitted all these facts, but alleged that the conveyance was made to him to get the land out of the way of an anticipated decision against the plaintiff in a pending suit, and set up the statute of frauds as a bar. The court overruled this defense, and decreed a reconveyance. The opinion, which proceeded upon the principle stated in the text, is an admirable and refreshing assertion of the equitable doctrine, and characterizes the conduct of the defendant and his attempt to shield his fraud under a plea of the statute in strong but well deserved terms.

(2) *Montacute v. Maxwell*, 1 P. Wms. 618; S. C., *sub nom.* *Montacue v. Maxwell*, 1 Stra. 263; 1 Eq. Cas. Abr. 19; S. C., *sub nom.* *Maxwell v. Montacute*,

SEC. 143. The general principle being thus formulated, it remains to ascertain the classes and kinds of cases to which it has been and will be applied. In the first place, where the requirements of the statute have not been complied with by reason of the actual fraud of the defendant, the contract is not within the statute, and will be specifically enforced against the fraudulent party, although it is merely verbal. The plaintiff must be induced, through the deceit, false statements, or concealments of the other party, to waive a written contract, and to rely upon a parol undertaking. The same is true when the execution of a written contract, otherwise fully agreed upon, is prevented by an inevitable accident—as, for example, by the death of one of the contracting parties.(1) The rule has been often applied in cases of agreements made in anticipation of marriage, where one

Prec. Ch. 526; see, also, *Whitridge v. Parkhurst*, 20 Md. 62; *Schmidt v. Gatewood*, 2 Rich. Eq. (S. C.) 162; *Kinard v. Hiers*, 3 Rich. Eq. 423; *Jenkins v. Eldridge*, 3 Story, 181.

(1) *Montacute v. Maxwell*, 1 P. Wms. 618; 1 Stra. 236; 1 Eq. Cas. Abr. 19; Prec. Ch. 526; *Walker v. Walker*, 2 Atk. 98; *Joynes v. Statham*, 3 Atk. 83; *Whitchurch v. Bevis*, 2 Bro. C. C. 565; *Lincoln v. Wright*, 4 DeG. & Jo. 16, 22; 5 Vin. Abr. 523, 524; S. C., 1 Eq. Cas. Abr. 20, pl. 5; *Crocker v. Higgins*, 7 Conn. 342; *McBurney v. Wellman*, 42 Barb. 390; *Arnold v. Cord*, 16 Ind. 177; *Finucane v. Kearney*, 1 Freeman, 65, 69; *Bernard v. Flinn*, 8 Ind. 204; *Glass v. Hulbert*, 102 Mass. 24, 39. In the case reported in 5 Viner, Abr. 523; 1 Eq. Cas. Abr. 20, pl. 5, decided by Lord NOTTINGHAM, and said to have been the first after the statute in which the doctrine was applied, there was a loan of money on a mortgage to be executed in the form of an absolute conveyance by the mortgagor, and a defeasance by the mortgagee, the latter verbally agreeing to give back the defeasance. Having obtained the absolute conveyance, the creditor refused to execute and deliver the defeasance as he had promised, and relied upon the statute. He was, however, decreed to execute according to his agreement, which was taken out of the statute by reason of his fraud. His fraud did not consist simply in refusing to carry out his verbal promise, but in the whole contrivance by which the plaintiff was cheated out of his property. In *Pember v. Mathers*, 1 Bro. C. C. 52, Lord THURLOW said, “that where objection is taken before the party executes an agreement, and the other side promises to rectify it, it is to be considered fraud on the party if such promise is not kept.” And see *Clarke v. Grant*, 14 Ves. 525, per Sir WILLIAM GRANT; *Colyer v. Clay*, 7 Bev. 188. In *Finucane v. Kearney*, 1 Freeman, 65, 69, it was said: “An acknowledged exception to the statute is where the agreement is intended to be reduced to writing, according to the statute, but is prevented by the fraud of one of the parties. And so I apprehend the rule would be where, as in this case, the contract was written out and one of the parties promised to sign it, but was prevented by inevitable accident. It is the peculiar province of courts of equity to relieve against accident as well as fraud.” S. P., in *Bernard v. Flinn*, 8 Ind. 204. See, also, *Childers v. Childers*, 1 DeG. & J. 482; *Davies v. Otty*, 35 Bev. 208; *Murphy v. Hubert*, 4 Harris, 50; 7 Barr. 420; *Wolford v. Herrington*, 24 P. F. Smith, 311; *Collins v. Tillou*, 26 Conn. 368; *Brown v. Lynch*, 1 Paige, 147; *Sweet*

of the parties has been, through the other's fraud, induced to forego a written contract, or a formal ante-nuptial settlement.(1)

SEC. 144. The principle is also applied, under certain circumstances, to the case of wills, which the English statute of frauds requires to be

*v. Jacocks*, 6 Paige, 355; *Kennedy v. Kennedy*, 2 Ala. 571; *Trapnall v. Brown*, 19 Ark. 39, 49; *Shields v. Trammell*, 19 Ark. 51; *Martin v. Martin*, 6 B. Mon. 8; and compare *Blodgett v. Hildreth*, 103 Mass. 484; *Walker v. Locke*, 5 Cush. 90. In *Taylor v. Luther*, 2 Sumn. 228, Mr. Justice STORY laid down the general doctrine in a very broad manner, which perhaps requires some limitation.

(1) *Dundas v. Dutens*, 1 Ves. 196; *Cookes v. Mascall*, 2 Vern. 200; *Montacute v. Maxwell*, 1 Eq. Cas. Abr. 19; *Prec. Ch.* 528; *Ballet v. Halfpenny*, 2 Vern. 373; 1 Eq. Cas. Abr. 20, pl. 6; *Bawdes v. Amhurst*, *Prec. Ch.* 404. In *Dundas v. Dutens*, *supra*, Lord THURLOW went to the extent of expressing an opinion that whenever the husband makes a parol agreement to settle, and then the marriage takes place in reliance upon it, he should be compelled to perform. This case certainly carries the doctrine to an extreme length, and its correctness has been doubted. See *Warden v. Jones*, 23 Beav. 487. In *Cookes v. Mascall*, a marriage had been arranged between plaintiff and defendant's daughter, and a certain settlement had been agreed upon; a solicitor on behalf of plaintiff was drawing up a settlement in accordance with this agreement; some disagreement arose respecting the draft of the settlement; plaintiff was, however, allowed to continue his visits as before, and the marriage took place with defendant's knowledge and approval, he seeing the couple off in the morning, and receiving and entertaining them on their return home. On his refusal to execute the settlement, the suit was brought, which resulted in a decree ordering him to execute the contract as it had been drawn up by the solicitor. The whole proceedings of the defendant were manifestly a fraudulent contrivance to consummate the marriage, without the settlement which he had agreed to make in consideration thereof, and the decision was based upon such fraud. In *Montacute v. Maxwell*, as reported in 1 Eq. Cas. Abr. and *Prec. Ch.*, the defendant had promised the plaintiff to settle his property upon her for her separate use, and gave instructions to have a settlement drawn up for that purpose. He then privately countermanded the instructions; and on the wedding day, the papers not being ready, defendant begged that the marriage should go on, since his friends were all present, and it would shame him if the wedding was put off; and he promised that she should have the same advantage of the agreement as if it had been in writing and properly executed. Relying on these representations, she consented to the marriage, but after it was consummated, he refused to carry out his agreement. On these facts, he was decreed to execute the settlement, the lord chancellor stating the rule to be, that if parties rely wholly upon the parol agreement, neither can compel the other to a specific performance, for the statute is directly in the way; but that if there is an agreement for reducing the same to writing, and that is prevented by the fraud and practice of the other party, the court would, in such a case, give relief—as where instructions were given for the drawing up of a settlement, and before it was completed, the woman was drawn in, by the assurances and promises of the man to perform it, to marry without a settlement. In this case, the secret countermanding of the instructions publicly given to the solicitor, clearly showed a fraudulent scheme on the husband's part, from the beginning of the negotiations, to entrap his wife into a marriage, without securing to her the separate use of her own property. In *Mallet v. Halfpenny*, *supra*, defendant, in a negotiation for the marriage of his

in writing. It is a settled rule, that if a party prevents a testator from making an intended devise in favor of a third person, and procures a devise directly to himself, by representations and assurances that he will carry out the original purpose of the testator, and apply the gift for the benefit of the person who would otherwise have been the recipient of the bounty, equity will enforce such promise, by holding that a trust arises out of the fraud of the actual devisee, and by compelling him to execute the trust in favor of the third person.(1) This doctrine, it would seem, should also be applied to contracts where the intention of one party towards the other has been frustrated, or prevented from being carried into effect, by the fraudulent interference, representations, or concealments of third persons.(2) It is, at all events, a well-settled doctrine of equity, notwithstanding the statute of frauds, or the American statutes relating to wills and

daughter with the plaintiff, signed a written agreement containing a settlement upon the intended husband and wife. Afterwards, and before the wedding, and for the purpose of escaping from his contract, he directed his daughter to put on a good humor and get the plaintiff to deliver up the writing to her, and then to marry him. By this means, the defendant got possession of the agreement, and the marriage took place; but the court decreed an execution of it.

(1) *Podmore v. Gunning*, 7 Sim. 644, and cases cited; *Chester v. Urwick*, 23 Beav. 407; *Harris v. Horwell*, Gilb. Eq. 11; *Devenish v. Baines*, Prec. Ch. 3; *Oldham v. Litchfield*, 2 Vern. 506; *Thynn v. Thynn*, 1 Vern. 296; *Chamberlaine v. Chamberlaine*, 2 Freem. 34; 2 Eq. Cas. Abr. 43; Prec. Ch. 4. In *Podmore v. Gunning*, the testator bequeathed his estate to his wife absolutely. After her death, two natural daughters proved a parol promise by the wife made to the testator, that after her decease the residuary estate should go to them. The court, upon the proof of this promise, granted them the relief, and enforced the promise. The will, however, contained the following clause, which seemed to refer to some such arrangement: "Having a perfect confidence that she (the wife) would act up to those views which he had communicated to her, in the ultimate disposal of his property after her decease."

(2) In *Lester v. Foxcraft*, Colles P. C. 108; 2 Vern. 456; Prec. Ch. 519, 526, a person had agreed to give plaintiff a lease of certain lands, who, relying thereon, had taken possession and made valuable improvements; the owner was anxious, when near his death, to execute the lease according to his agreement, but was prevented by the fraudulent practices of his relatives from seeing the plaintiff, and actually died without performing. These relatives who succeeded to the estate were compelled, by a decree in equity, to specifically perform the contract. It is true that the decision was mainly rested upon the fact of a part performance by the plaintiff, and the case is generally regarded as the leading one in support of that doctrine. But if there had been no part performance, the fraudulent contrivances and practices of the defendants would have furnished a sufficient ground for granting the relief. See, also, *Story Eq. Jur.* § 768; *Chamberlain v. Agar*, 2 V. & B. 262; *Mestaer v. Gillespie*, 11 Ves. 638; *Stickland v. Albridge*, 9 Ves. 519; *Dixon v. Olmius*, 1 Cox, 414; *Reech v. Kennegal*, 1 Ves. Sen. 123; *Sellack v. Harris*, 5 Vin. Abr. 521.

the mode of raising trusts, that wherever a person acquires the legal title to lands by means of a verbal promise to hold them for a certain specified purpose—as, for example, a promise to convey them to a designated individual, or to reconvey them to the grantor, and the like; and having thus obtained the title fraudulently, retains, uses and claims the lands as absolutely his own, so that the whole transaction, by means of which the ownership was obtained, is based upon deceit, and is, in fact, a scheme of actual fraud; such party is regarded as holding the lands charged with an implied trust arising from his fraud, and he will be compelled, by a court of equity, to execute this trust by performing his engagement, and by conveying the estate in accordance with his promise. The statutory requirement that a trust must be created by a written instrument, does not apply to such a case, since trusts *ex maleficio* are either expressly or tacitly excepted from its provisions.(1) In order, however, that the general doctrine

(1) *Hunt v. Roberts*, 40 Me. 187; *Hodges v. Howard*, 5 R. I. 149; *Fraser v. Child*, 4 E. D. Smith, 153; *Hoge v. Hoge*, 1 Watts, 214; *Cousins v. Wall*, 3 Jones Eq. 43; *Cameron v. Ward*, 8 Geo. 245; *Jones v. McDougal*, 32 Miss. 179; *Martin v. Martin*, 16 B. Mon. 8; *Arnold v. Cord*, 16 Ind. 177; *Nelson v. Worrall*, 20 Iowa, 469; *Coyle v. Davis*, 20 Wisc. 593; *Hidden v. Jordan*, 21 Cal. 92; *Sandfoss v. Jones*, 35 Cal. 481; *Laing v. McKee*, 13 Mich. 124. This doctrine is often used with salutary efficacy in cases where, at an execution sale, or sale under a mortgage foreclosure, or other similar public sale, a party buys in the land under a prior promise made to the execution or mortgage-debtor or other interested owner, that he, the purchaser, will take the title and hold the land for the benefit of such owner, and will reconvey to him on being repaid the amount advanced for the purchase-price, and having thus, by fraudulent contrivance, cut off competition, and obtained the property for perhaps less than its value, refuses to keep his promise, and retains the land as absolutely his own. Equity will interfere on behalf of the defrauded owner, and compel a conveyance in accordance with the trust *ex maleficio*. *Rose v. Bates*, 12 Mo. 30; *Moore v. Tisdale*, 5 B. Mon. 352; *Letcher v. Crosby*, 2 A. K. Marsh. 106; *McCulloch v. Cowher*, 5 Watts & S. 430; *Kisler v. Kisler*, 2 Watts, 323; *Schmidt v. Gatewood*, 2 Rich. Eq. 162; *Green v. Ball*, 4 Bush. 586. In the very recent case of *Dodd v. Wakeman*, 11 C. E. Green, 484, the court said the rule is settled (at least in New Jersey), that a parol contract to purchase land at a sheriff's sale for the benefit of the execution debtor, and that he shall have a conveyance of it on reimbursing the purchaser, will be enforced in equity, even if free from fraud, unless the statute of frauds is properly pleaded by way of defense (citing *Combs v. Little*, 3 Green Ch. 310; *Marlatt v. Warwick*, 3 C. E. Green, 109, 4 ib. 441; *Merritt v. Brown*, 6 C. E. Green, 404). And even where defendant pleads the statute, if it clearly appears that he has made use of such contract, or any other contrivance, to obtain the property for an inadequate price, or to the oppression of the execution debtor, a court of equity must grant the relief (citing *Walker v. Hill's Ex'ors*, 7 C. E. Green, 519; *Merritt v. Brown*, 6 C. E. Green, 404). In *Ryan v. Dox*, 34 N. Y. 307, the doctrine of the text is fully supported by the New York court of appeals, after an elaborate examination of the authorities and discussion of the principles.



above stated can be enforced under any circumstances, there must be something more than a mere verbal promise, however unequivocal, otherwise the statute would be virtually abrogated; there must be an element of actual, positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated. Equity does not pretend to enforce verbal promises in the face of the statute; it endeavors to prevent and punish fraud, by taking from the wrong-doer the fruits of his deceit, and it accomplishes this object by its beneficial and far-reaching doctrine of implied trusts.(1)

## SECTION V.

### *The contract must be complete.*

SECTION 145. It is an elementary doctrine of the courts of equity that they will not specifically enforce any contract unless it be complete and certain.(2) In the discussions of the present and next

This decision is not in the least shaken by the subsequent case of *Levy v. Brush*, 45 N. Y. 589, which is clearly distinguishable upon the facts, and which expressly acknowledges the correctness of the former decision. See, also, the very late case of *Wheeler v. Reynolds*, 66 N. Y. 227, which fully discusses the doctrine and its limitations.

(1) *Leman v. Whitley*, 4 Russ. 423; *Barnet v. Dougherty*, 32 Pa. St. 372; *Pattison v. Horn*, 1 Grant (Pa.), 301; *Hogg v. Wilkins*, 1 Grant, 67; *Campbell v. Campbell*, 2 Jones Eq. 364; *Chambliss v. Smith*, 30 Ala. 366; *Whiting v. Gould*, 2 Wisc. 404; *Farnham v. Clements*, 51 Me. 423; *Levy v. Brush*, 45 N. Y. 589.

(2) *Buxton v. Lister*, 3 Atk. 336, per Lord HARDWICKE: "Nothing is more established in this court than that every agreement of this kind ought to be certain, fair, and just in all its parts. If any of those ingredients are wanting in the case, this court will not decree a specific performance." *Lord Walpole v. Lord Orford*, 3 Ves. 420, per Lord ROSSLYN: "I lay it down as a general proposition, to which I know no limitation, that all agreements, in order to be executed in this court, must be certain and defined; secondly, they must be equal and fair, for this court, unless they are fair, will not execute them; and thirdly, they must be proved in such manner as the law requires." See *Underwood v. Hitchcox*, 1 Ves. Sen. 279; *Franks v. Martin*, 1 Ed. 309. For examples of the kinds of contracts which cannot be specifically executed by a court of equity, because of their incompleteness, see, where the negotiation was not ended, *Honeyman v. Maryatt*, 21 Beav. 14; 6 H. L. Cas. 112; *Stratford v. Bosworth*, 2 V. & B. 341; *Tawney v. Crowther*, 3 Bro. C. C. 318. Where it is only the basis of an agreement, and not the agreement itself, *Frost v. Moulton*, 21 Beav. 596; *Losee v. Morey*, 57 Barb. 561. Where it provides that one or more of the terms are to be settled afterwards, *Wood v. Midgley*, 5 DeG. M. & G. 41. Where the arrangement is still in abeyance, and one party may still withdraw his consent, *Lord Glengal v. Barnard*, 1 Ke. 769; *Johnson v. Johnson*, 16 Minn. 512 (a mere understanding, but no definite contract).

succeeding section, the element of completeness denotes that the contract embraces all the material terms; that of certainty denotes that each one of these terms is expressed in a sufficiently exact and definite manner. An incomplete contract, therefore, is one from which one or more material terms have been entirely omitted. An uncertain contract is one which may indeed embrace all the material terms, but one or more of them is expressed in so inexact, indefinite, or obscure language, that the intent of the parties cannot be sufficiently ascertained to enable a court to carry it into effect. The former of these qualities is the subject-matter of the present section. This element of completeness must exist in every contract which can be specifically enforced, whatever be its external form, whether written or verbal, whether embodied in the memorandum required by the statute of frauds, or rendered obligatory by part performance, or by any other mode which may obviate the prohibitions of that statute. It should be observed, however, that the completeness here spoken of, although quite analogous to, is really more extensive and embracing more particulars than that which, we have seen, must be found in the note or memorandum of the agreement mentioned in the statute of frauds, since it must extend to the entire contract. In order that any agreement, whether covered by the statute or not, whether written or verbal, may be specifically enforced, it must be complete in all its parts; that is, all the terms which the parties have adopted, as portions of their contract, must be finally and definitely settled, and none must be left to be determined by future negotiation; and this is true without any regard to the comparative importance or unimportance of these several terms. The element of completeness necessarily includes all the terms which are stated in the memorandum, but it may extend beyond this evidentiary writing, and it applies to all the contract, whether embraced in the memorandum or not. It should also be remarked, before proceeding with the discussion, that when a contract has been partly performed by the plaintiff, and the defendant has received and enjoys the benefits thereof, and the plaintiff would be virtually remediless unless the contract were enforced, the court, from the plainest considerations of equity and common justice, does not regard with favor any objections raised by the defendant merely on the ground of the incompleteness or uncertainty of the agreement. Even if the agreement be incomplete, the court will then, in furtherance of justice and to prevent a most inequitable result, decree a performance of its terms as far as possible, although, perhaps, with compensation or allowance. In fact, as has been shown in

chapter 1, one ground of the equitable jurisdiction to decree a specific performance is the incompleteness of the contract, which would prevent an action at law, but which exists to such a limited extent and under such circumstances that a refusal to grant any relief would be plainly inequitable.(1)

SEC. 146. In discussing the element of completeness, a contract may be considered in reference to the following particulars: 1. The parties. 2. The price. 3. The subject-matter. 4. The promises and other miscellaneous terms, and the whole subject will be presented in a clearer light, if the decisions are examined and arranged in accordance with these divisions.

SEC. 147. I. *The parties*.—There can be no complete contract unless the parties are known and determined; they are essential to the very conception of a binding agreement. The rule is a general one that their names must appear in the contract, or on the face of it, as the contracting parties. When the agreement is verbal, and is therefore proved by parol evidence, there cannot, from the nature of the case, be any real doubt or difficulty if a contract has actually been made; for the disclosure of the parties is necessarily involved in the proof of the contract itself. The rule, in its general form, applies as well to written agreements, which must state the parties, either by name or by sufficient description.(2) Under this general rule, however, especially when applied to a written contract, there arise several subordinate questions, namely: when and to what extent does the name of an agent appearing alone in the agreement, as a party thereto, take the place of the principal and satisfy the demands of the rule itself? How far is a description of a party by his title, office, or otherwise, instead of his name, a sufficient compliance with the rule? To what extent is extrinsic evidence admissible to identify the party who is simply described or indicated in any manner other than by giving his name? Is it necessary, in a contract of sale, assignment, leasing and the like, whereby a right or interest is transferred, to indicate on the face of the writing which of the parties is the vendor, assignor or lessor, and which the vendee, assignee or lessee; and, in the absence of such express indication in the language of the instrument, can parol evidence be used in order to fix the proper characters in this respect upon the several parties? As these questions have just been examined and answered, and the cases furnishing their solution have

(1) See *ante*, § 33.

(2) *Warner v. Willington*, 3 Drew. 523; *Squire v. Whitton*, 1 H. L. Cas. 333; *Champion v. Plummer*, 1 B. & P. (N. R.) 253; *Stanton v. Miller*, 58 N. Y. 192.

just been cited in the preceding section which treats of the memorandum required by the statute of frauds; and as the same conclusions must apply to all written agreements, it would be a useless repetition to go over the same ground again, and the reader is referred to the discussion at the place mentioned.(1)

SEC. 148. II. *The Price*.—In all contracts of sale, assignment, and the like, the price is, of course, a material term. It must either be fixed by the agreement itself, or means must be therein provided for ascertaining it with certainty. In the absence of such provision, either stating it or furnishing a mode for fixing it, the agreement would be plainly incomplete, and could not be enforced; and if the contract is written, this term must appear in the memorandum or written instrument.(2) This rule, of course, does not apply to gifts,

(1) See *ante*, §§ 75, 83, 89

(2) *Clerk v. Wright*, 1 Atk. 12; *Bromley v. Jefferies*, 2 Vern. 415; *Elmore v. Kingscote*, 5 B. & C. 533; *Goodman v. Griffiths*, 25 L. J. Ex. 145; *Preston v. Mercœur*, 2 W. Bl. 1249; *Blagden v. Bradbear*, 12 Ves. 466; *Hopcraft v. Hickman*, 2 S. & S. 130; *Chichester v. McIntyre*, 4 Bli. (N. S.) 79; *Powell v. Lovegrove*, 39 Eng. L. & Eq. 427; and see cases cited under § 94. As illustrations, in *Bromley v. Jeffries*, *supra*, an agreement to sell an estate to the vendee named, "for 500*l.* less than any other purchaser would give," was held incomplete, since it stated no price nor furnished any certain means of ascertaining it, consistent with the terms of the contract itself. Plainly it would be impossible to find out how much any other purchaser would give without entering into a contract of sale, at least verbal, with some person; and that being done, it would be grossly inequitable to abandon that bargain for the sake of carrying into effect the one in suit. In *Hopcraft v. Hickman*, *supra*, the contract was to sell at a price to be fixed by two valuers, who made an award but did not finally and definitely fix upon any price, and a specific performance was therefore refused. In *Chichester v. McIntyre*, *supra*, the contract contained the same provision as to the price; but in making their award, one of the arbitrators was guilty of very wrongful conduct, and their decision was plainly erroneous; the court, therefore, refused to be governed by it, or to enforce the agreement. The rule given in the text includes that already stated concerning the memorandum required by the statute of frauds, but is broader in its application, since it extends to all contracts verbal or written. The following cases furnish additional illustrations of the rule as stated in the text: *Huff v. Shepard*, 58 Mo. 242, stipulation in a land contract that the price shall be paid "on such terms as may be agreed upon between said parties," held to render the agreement incomplete; *Potts v. Whitehead*, 5 C. E. Green, 55, a stipulation fixing the price, and providing that a certain portion was to be paid on the execution of the deed, and the residue was to be secured by a bond and mortgage on the land at six per cent interest, without any provision for the time of payment of the portion so secured, held to render the contract too incomplete for enforcement. The various provisions of the contract plainly rebutted the implication that the balance was to be paid immediately, which sometimes arises when no time is specified. *Mastin v. Halley*, 61 Mo. 196, in a contract to convey land, the only consideration named was, that the vendee should

which, under certain circumstances of parol performance by the donee, will, as has already been shown, be enforced by courts of equity.(1) There is an apparent but not real exception to this general proposition. A valid contract of sale may be made without any stipulation as to the price, the law in such case implying that the price is the reasonable value of the thing which is the subject-matter of the agreement. This is, however, no exception to, but rather a special instance of, the foregoing rule; because such a contract does, in fact, by operation of the law, furnish a means of exactly ascertaining and fixing the price.(2)

SEC. 149. The case in which the contract does not itself fix upon the price, but furnishes a method by which the price shall be determined, requires a special consideration. There may be various such modes. The price may be left to the action of certain persons as valuers or arbitrators;(3) or it may be referred to and depend upon some past or future event—as, for example, it may be the amount for which the property was sold at a former time, to be ascertained by extrinsic evidence.(4) It is a settled doctrine, that whenever the price is thus made to depend upon the decision of valuers, or upon any other future action or event, the contract is not completed, and will not be enforced until the price has been actually fixed in the manner provided, or in some other equivalent manner satisfactory to the court. A decree of specific performance will never be made, ordering payment of such an amount as certain arbitrators may thereafter award; the decision must precede the decree.(5) The provision not infrequent in contracts of sale or leasing, whereby the determination of the price is referred to arbitrators, or is made to depend upon some future action of third persons, or upon other future

erect “a certain building” thereon, without further description, held too incomplete in this particular to be enforced. *Spangler v. Danforth*, 65 Ill. 152, a contract stating that the vendee “agreed to take the pasture lot for \$2,400; \$1,000 cash, \$400 December 1, 1871, at ten per cent; \$1,000 July 1, 1872, at ten per cent, to be secured by a mortgage,” held sufficiently definite. *Grace v. Denison*, 114 Mass. 116, an agreement to convey land “for \$25,000, and mortgage to remain at five per cent for five years,” held incomplete. *Query*. Why did not this clause imply that the whole price was to remain on mortgage for the five years? It would then be clearly complete and certain; and this appears to be the natural meaning of the language.

(1) See *ante*, § 130.

(2) See *Hoadly v. McLaine*, 10 Bing. 482.

(3) *Cooth v. Jackson*, 6 Ves. 12; *Brown v. Bellows*, 4 Pick. 189.

(4) *Atwood v. Cobb*, 16 Pick. 230.

(5) *Darbey v. Whitaker*, 4 Drew. 134.

event, has given rise to the following important question, namely, whether, when the mode pointed out by the contract has finally failed from the inability or unwillingness of the valuers to act, or from the refusal of the defendant to appoint a valuer in pursuance of his stipulation, or from any other cause, the court will, in a suit brought to enforce the agreement itself, determine the price, or will adopt some other mode of fixing it in place of that which the parties chose, and which has failed. Such action by the court would not be a step in the process of specifically enforcing the contract, although undoubtedly somewhat analogous to a performance; it would rather be a proceeding for completing and perfecting the contract, so that it might afterwards be enforced. It is an elementary doctrine, that if an agreement is left by the parties wholly incomplete, the court cannot put itself in their place, and make a contract for them. The decisions which furnish an answer to the question above stated, turn upon this familiar doctrine, and are separated into two classes—the first of which includes the contracts to which the doctrine applies; the second, those to which it does not apply. These two groups of cases will be examined separately.

SEC. 150. The first class embraces those contracts in which, by the form and language of the stipulation, the mode of determining the price by arbitrators or valuers is made an essential term—in fact, a condition to the validity of the agreement. When such is the nature of the provision, if the means which it furnishes for ascertaining the price finally fail for any reason, the contract itself is held to be incomplete, and because the term which has thus become inoperative was made essential, the general principle above cited comes into force, and prevents the court from making a new contract by providing another method for fixing the price, and as a result a specific execution is refused.(1) The doctrine has even been applied where the

(1) The leading case on the subject is *Milnes v. Gery*, 14 Ves. 400, in which the agreement was to convey land at a price to be fixed by two valuers, one appointed by each party or by their umpire. The valuers failed to agree, and Sir WILLIAM GRANT, M. R., held that the agreement was thus rendered incomplete, and the court had no power to appoint other arbitrators, or to fix the price itself, for this would be to make a contract different from that agreed upon by the parties themselves. This case has been approved and its doctrine followed in many subsequent ones, nor has it ever been repudiated; although, as will soon be shown, the court, in the most recent English decisions, has declared that its doctrine should not be extended, but should be restricted in its application to the exact facts; and even its correctness has been questioned. In *Morse v. Merest*, 6 Mad. 26, Sir JOHN LEACH said: "A man who agreed to sell at a price to be named by A., B. and C., could not be compelled by a court of equity to sell at any other

failure to determine the price in the manner agreed was the result of the defendant's intentional act or omission—as, for example, his refusal to appoint one of the arbitrators, or his other default.<sup>(1)</sup> The correctness of this application, however, may, in the light of the recent English decisions hereinafter quoted, be well doubted.

SEC. 151. The second class embraces those contracts in which a mode for ascertaining the price is mentioned, but from the language of the stipulation it is regarded as non-essential, and as something rather by way of suggestion, so that the agreement itself is virtually one to sell for a fair price. In such a case, if the means specified for fixing upon the price fail for any reason, the court does not treat the contract as fatally defective; but will, in the suit for a specific performance, direct a fair and reasonable price to be ascertained in some manner preliminary to the decree, either by referring the matter to a master or other officer, or by appointing a skilled person as a special valuer, or even by determining the amount itself; it will pursue any

price." See, also, *Blundell v. Brettargh*, 17 Ves. 232; *Gourlay v. Duke of Somerset*, 19 Ves. 429; *Agar v. Macklew*, 2 S. & S. 418; *Darbey v. Whitaker*, 4 Drew. 134; *Morgan v. Birnie*, 9 Bing. 672; *Thurnell v. Balbirnie*, 2 M. & W. 783; *Milner v. Field*, 5 Ex. 829. The same doctrine has been followed in this country. In *Norfleet v. Southall*, 3 Murph. 189, two parties built a mill together. A. contracted to convey his half to B. on being paid its cost, which, it was further agreed, should be ascertained by certain persons. These valuers could not agree upon any amount, and A. would not consent to the appointment of an umpire. The court held that to decree a specific performance, would be to make a contract for the parties, and then enforce it; that defendant A.'s agreement was not to convey on being paid the cost of his half, but to convey on being paid the cost as fixed by the arbitrators named. Again, in *Graham v. Call*, 5 Munf. 396, the contract was to convey land for a price to be determined by the parties; and one of them having died before the amount had been fixed by them, the court held the agreement incomplete, and refused to grant a specific performance.

(1) In *Darbey v. Whitaker*, 4 Drew. 134, the price was agreed to be fixed by valuers, but one of them refused to act, because the defendant had informed him that he would not perform even if an award was made, and a specific execution was refused. In *Wilks v. Davis*, 3 Meriv. 507, the agreement was to convey for a price to be fixed by arbitrators, but the defendant refused to perfect the arbitration arrangement by executing an arbitration bond, and the court, for that reason, refused to enforce the contract. In another somewhat analogous case (*Morgan v. Milman*, 3 DeG. M. & G. 24), the stipulation as to price was that it should be determined in one of two alternative manners specified; no election having been made between these two methods, the contract was held incomplete, and a specific performance impossible. See, also, *Norfleet v. Southall*, 3 Murph. 189; *Dike v. Greene*, 4 R. I. 285, 289; *Graham v. Call*, 5 Munf. 396; *Baker v. Glass*, 6 Munf. 212; *Wilks v. Davis*, 3 Mer. 507; *Collins v. Collins*, 26 Beav. 306; *Vickers v. Vickers*, L. R. 4 Eq. 529; *Richardson v. Smith*, L. R. 5 Ch. 648; *Earl of Darnley v. London, Chatham & Dover Ry. Co.*, 3 DeG. J. & S. 24; L. R. 2 H. L. 43; *Frith v. Midland Ry. Co.*, L. R. 20 Eq. 100.

such mode as the circumstances of the case show to be expedient.<sup>(1)</sup> The tendency of the later English decisions is to consider these stipulations for a determination of the price by third persons, rather as matters of form than of substance; to construe them in such manner that they become incidental only to the main object of the agreement. The court will always look at the substance of the agreement, and disregard the mere forms which had been provided for effectuating it, and which cannot be made operative. It is a settled rule, that where a contract provides for the sale of an estate, or a dwelling-house, or a manufactory, at a specified price, and also for the sale of the timber in the one case, or the furniture in the second, and the fixtures or machinery in the other, at prices to be fixed by arbitration, if the arbitration fails for any reason, the contract will still be enforced—the price of the timber, furniture, or machinery being ascertained in some convenient manner. The result is, that while the doctrine of *Milnes v. Gery*, and of the class of cases to which it belongs, has not been

(1) *Van Doren v. Robinson*, 1 C. E. Green, 256; *Whitlock v. Duffield*, 1 Hoff. Ch. 110; *City of Providence v. St. John's Lodge*, 2 R. I. 46; *Dike v. Greene*, 4 R. I. 285. In *Milnes v. Gery*, 14 Ves. 400, Sir WM. GRANT stated the distinction between the two classes of cases, as given in the text, in a very clear and emphatic manner; and although he held that the case fell under the first class, he at the same time described the features and incidents of a contract which would bring it within the second. The distinction thus formulated by him has been followed by subsequent judges. In *Hall v. Warren*, 9 Ves. 605, where, by a clause of the contract, the price was to be named by valuers, and by reason of the vendor becoming insane these valuers could not be appointed, Sir WM. GRANT held that where there was a valid and binding contract, the supervening incapacity of one party cannot deprive the other of its benefit, and the court would appoint the valuers. Afterwards, in *Gourlay v. Duke of Somerset*, 19 Ves. 429, where the contract was to give a lease with such provisions and conditions as a named person (A.) should think proper, the same judge held that this provision for a reference to A. was not essential, and sent the cause to a master to settle and fix the terms of the lease. In a much later case (*Jackson v. Jackson*, 1 Sm. & Gif. 184), the agreement was to sell a certain manufactory for a named sum, and also the machinery and fixtures for a price to be fixed by valuers to be appointed by the parties. Sir JOHN STUART, V. C., held this clause was non-essential, and granted a specific performance after the price had been ascertained in another manner. It should be noticed that the price for the manufactory itself, which was the main thing, had been fixed, and that the provision in reference to the machinery was in its nature auxiliary and subsidiary to the main object of the contract. In *Meynell v. Surtees*, 3 Sm. & Gif. 101, 113; affd. 1 Jur. (N. S.) 737, Sir JOHN STUART stated, as a general principle, that "where possession is referable to an agreement to give a fair consideration, the amount of which has not been settled, the court will, in favor of possession and expenditure referable to this agreement, endeavor by every means within the legitimate bounds of its jurisdiction to ascertain the amount of the consideration." See, also, *Paris Chocolate Co. v. Crystal Palace Co.*, 3 Sm. & Gif. 119, 123; *Eads v. Williams*, 4 DeG. M. & G. 674.



repudiated, and is even now enforced when the facts call for its application, yet it is carefully restricted to the kind of contracts already mentioned; the court will treat the contract as falling within the second class, unless it would thereby do violence to the language and thwart the plain intent of the parties.(1) If the price has already been paid, the amount of it need not be stated in the written agreement or memorandum thereof, since that term of the contract having been performed is not material.(2)

SEC. 152. III. *The Subject-matter*.—The subject-matter is, of course, a most essential term, and unless so defined and described that it can be certainly identified by means of the extrinsic explanatory evidence admissible in such a case, the contract would be incomplete, and wholly incapable of enforcement. While the description need not be so minute and exhaustive that the individual thing which constitutes the subject-matter will be fully known from a mere reading or recital of the language, yet it must be so definite as to show what the purchaser supposed he was contracting for, and what the vendor intended to sell;(3) and as to enable the court to ascertain what it is by the aid of proper evidence.(4) From the nature of the case, it is almost impossible that a description should be so perfect as to dispense with all resort to evidence. Parol evidence is always admissible to explain the surrounding circumstances, and situation and relations of the parties, at and immediately before the execution of the contract, in order to connect the description with the thing intended, and thereby to identify the subject-matter, and to explain all technical terms and phrases used in a local or special sense. The description

(1) *Binham v. Bradford*, L. R. 5 Ch. 519; *Richardson v. Smith*, L. R. 5 Ch 648; *Smith v. Peters*, L. R. 20 Eq. 511.

(2) *Holman v. Bank of Norfolk*, 12 Ala. 369; *Fugate v. Hansford*, 3 Litt. (Ky.) 262. See *ante*, § 94.

(3) *Stewart v. Alliston*, 1 Meriv. 26, 33.

(4) *Daniels v. Davison*, 16 Ves. 256, per Lord Eldon; *Kennedy v. Lee*, 3 Meriv. 441, 451; *Bell v. Warren*, 39 Tex. 106; *King v. Ruckman*, 5 C. E. Green, 316; *Miller v. Campbell*, 52 Ind. 125 ("the 120 acres of land in Shannon Co., Mo.," held too indefinite without parol evidence going farther than is admissible); *Lynes v. Hayden*, 119 Mass. 482; *Carr v. Passaic Land, etc., Co.*, 7 C. E. Green, 85 (resolution of the directors of a corporation "that two acres be sold," too incomplete in the description to be specifically enforced); *Holmes v. Evans*, 48 Miss. 247; *Ross v. Baker*, 72 Pa. St. 186; *Chidester v. Springfield, etc., R. R.*, 59 Ill. 87. Cases in which the subject-matter has been identified by extrinsic evidence. *Hurley v. Brown*, 98 Mass. 545; *Waring v. Ayres*, 40 N. Y. 357; *Torr v. Torr*, 20 Ind. 118; *White v. Hermann*, 51 Ill. 243; *Fowler v. Redican*, 52 Ill. 405; *Purinton v. Northern Ill. R. R.*, 46 Ill. 297; *McMurray v. Spicer*, L. R. 5 Eq. 527; and see cases cited under section 90.

must be sufficient to render the identity clear upon the introduction of such evidence.(1) But if the description in a written contract is so indefinite that the subject-matter is not thus clearly determined by the help of *such* auxiliary evidence, and further parol evidence would be necessary to disclose the intent of the parties, and to actually supply the substantive term which they have either wholly omitted or inadequately expressed, then the defect is fatal, the agreement is incomplete, and cannot be enforced.(2) The description may be wholly or partially contained in a separate document, which, if referred to by the other portions of the written contract in such a manner as to establish a connection between them, becomes a constituent part of the agreement, and in such a case, parol evidence to identify the document thus referred to is admissible.(3) Or the accompanying document may be signed simultaneously with the principal agreement, or may be otherwise authenticated by the parties, so as to show that one of them is to be taken in connection with and explanatory of the other.(4)

SEC. 153. An agreement for a lease must, of course, specify the duration of the term, for otherwise the letting would be a mere tenancy at will, which, in accordance with principles already stated, would not be specifically enforced. If such an agreement is written, the want of provisions fixing the extent of the term cannot be supplied by parol

(1) The rule is the same as that which regulates the admission of parol evidence to identify persons and things mentioned in wills or deeds. The following cases furnish examples of the rule stated in the text. The description "Mr. Ogilvie's house," in a contract, was held sufficient, because the property intended could be easily identified, in *Ogilvie v. Foljambe*, 3 Meriv. 53; parol evidence was admitted to explain the phrases "50*l.* more of premium," and "the profit rent of the present tenant," in *Skinner v. McDouall*, 2 DeG. & S. 265; the description, "the mill property, including cottages, in Ester village, all the property to be freehold," also held sufficient, being fully identified by parol evidence, *McMurray v. Spicer*, L. R. 5 Eq. 527; *Robeson v. Hornbaker*, 2 Green's Ch. 60; *Fowler v. Redican*, 52 Ill. 405; *Waring v. Ayres*, 40 N. Y. 357; *Mead v. Parker*, 115 Mass. 413; and *ante*, § 90.

(2) In an agreement for letting, the only description of the thing to be leased was "coals, etc." This was held wholly insufficient by KNIGHT BRUCE, L. J., in *Price v. Griffith*, 1 DeG. M. & G. 80. See, also, *Inge v. Birmingham, etc., Ry. Co.*, 3 DeG. M. & G. 658; *McMurtrie v. Bennette*, 1 Harring. Ch. 124. The description in a written contract, to sell "all that piece of property known as the Union Hotel property," was held insufficient in *King v. Wood*, 7 Miss. 389. The correctness of this decision may well be doubted.

(3) *Clinan v. Cooke*, 1 Sch. & Lef. 21, 33; *Baumann v. James*, L. R. 3 Ch. 508. See *ante*, §§ 83, 84.

(4) *Nene Valley Drainage Comm'rs v. Dunkley*, L. R. 4 Ch. D. 1.

evidence.(1) A description of the subject-matter in contracts, as well as in deeds and wills, is sufficient when it complies with the maxim, *id certum est quod certum reddi potest*. For example, a contract for the sale of land will sufficiently define the particular tract sold by referring to the description contained in a certain deed on record, or in the possession of the vendor.(2)

SEC. 154. IV. *Other material terms*.—A contract to be complete must also contain all the other material terms in addition to those already described. Of course, no rule can be laid down by which the materiality of the terms shall be determined in all cases, because this must depend upon circumstances special to every case. The general doctrine, however, has been formulated by eminent judges, that an agreement framed in general terms will be enforced where the law will supply the details; but if any of its details are to be supplied by modes which the court cannot adopt, there is then no complete contract capable of being specifically executed.(3) This doctrine applies with special force to contracts which have been reduced to a written form, for then the familiar principle becomes operative, that an agreement in writing cannot, when it is set up as the cause of action or defense in a suit, be altered, or added to by parol evidence, so that if a written contract lacks a material term it cannot be specifically enforced.(4)

(1) *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Fitz Maurice v. Bayley*, 3 L. T. (N. S.) 69; *Farwell v. Mather*, 10 Allen, 322; *Hurley v. Brown*, 98 Mass. 545; *Hodges v. Howard*, 5 R. I. 149; *Abeel v. Radcliff*, 13 Johns. 300; *Nesham v. Selby*, L. R. 7 Ch. 406; 13 Eq. 191. Memorandum of an agreement to take a lease, which specified the term of years and the rent and other matters, but omitted to state on what day the letting should commence, held incomplete, and a specific performance refused.

(2) *Owen v. Thomas*, 3 My. & K. 353; *Haywood v. Cope*, 4 Jur. (N. S.) 227; *Bauman v. James*, L. R. 3 Ch. 508. In *Monro v. Taylor*, 8 Hare, 51, the contract was to sell an estate described as within certain ascertained metes and bounds, and as being partly freehold and partly leasehold. It was held not void for uncertainty, since it was good as a contract to sell the vendor's interest in the land. It was further held that the vendee was entitled to have the boundaries of the freehold and of the leasehold portions ascertained, to have the extent of each portion determined.

(3) *South Wales Ry. Co. v. Wythes*, 5 DeG. M. & G. 888, per TURNER, L. J.; *Ridgway v. Wharton*, 6 H. L. Cas. 285, per Lord St. LEONARDS.

(4) The doctrine of the text can best be illustrated by examples of incompleteness. Contracts have been held incomplete as follows: An agreement to lease which did not in any way state the duration of the term. *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Gordon v. Trevelyan*, 1 Pri. 64. A similar agreement which did not state the time when the term was to commence. *Blore v. Sutton*, 3 Meriv. 237; *Cox v. Middleton*, 2 Drew. 209; *Hersey v. Giblett*, 18 Beav. 174. A similar

SEC. 155. The terms thus far spoken of are all express. There are, also, in certain species of contracts, terms implied by legal presumption. Whether such terms are necessary or immaterial, the failure of a contract, written or verbal, to state them in express language, does not and cannot render it incomplete, since the very essence of an implied term consists in its not being expressed, but simply inferred as a presumption of law from the other provisions of the agreement. The following are some of the terms implied in contracts in general use, it being assumed, in every case, that there is nothing in the contract by which the presumption could be defeated. An agreement to sell land, not specifying the interest, is impliedly an agreement to sell all of the interest which the vendor has.(1) In England, an agreement to sell a house simply implies that the estate sold is a fee simple.(2) In the United States, an agreement to sell and convey land generally, nothing appearing to raise a contrary inference, implies an undertaking to sell and convey the fee simple.(3) Every agree-

agreement which did not state at what time an increased rent provided for was to commence. *Lord Ormond v. Anderson*, 2 Ba. & By. 363. An agreement for a lease for lives which did not name the lives nor provide for their being named. *Wheeler v. D'Esterre*, 2 Dow. 359. But, perhaps, the lessee may name in such a case. *Lord Kensington v. Phillips*, 5 Dow. 61. Where the alleged agreement was an auctioneer's receipt, which did not state the conditions of the sale, nor the proportion the deposit was to bear to the price. *Blagden v. Bradbear*, 12 Ves. 466. An agreement in which a stipulation as to expenses was not settled. *Stratford v. Bosworth*, 2 V. & B. 341. An agreement for partnership which defined the term for which it was to last, but did not specify the amount of the capital and the manner in which it was to be furnished. *Downs v. Collins*, 6 Hare, 418. A contract for the sale of land wherein the vendor agreed to take in part payment a house and lot at its cash value to be fixed by two persons, and the parties agreed to appoint these valuers, but no time within which such appointment should be made was specified, and in fact they never made any, was held too incomplete to be specifically executed. *Baker v. Glass*, 6 Munf. 212; *Rummens v. Robins*, 3 DeG. J. & S. 88. Defendants offered by letter to sell to the plaintiff a piece of land at a named price, the letter ending: "There will be the usual clauses in a contract, and some limitations as to the length of the title to be shown and other minor details," was accepted in writing. Held incomplete and not enforced; uncertain as to the clauses to be inserted, and as to the title. See, also, *Tiernan v. Gibney*, 24 Wisc. 190; *Potts v. Whitehead*, 5 C. E. Green, 55; *Nichols v. Williams*, 7 C. E. Green, 63; *Riley v. Farnsworth*, 116 Mass. 223; *Clark v. Clark*, 49 Cal. 586; *Grace v. Denison*, 114 Mass. 16.

(1) *Bower v. Cooper*, 2 Hare, 408.

(2) *Hughes v. Parker*, 8 M. & W. 244.

(3) *Hoffman v. Fett*, 39 Cal. 109; *Kyle v. Kavanagh*, 103 Mass. 356, under the Mass. Gen. Stat., ch. 89, § 8, an agreement to convey with a good title may be complied with by giving a quit-claim deed; *Allen v. Atkinson*, 21 Mich. 351; *Holland v. Holmes*, 14 Flor. 390; *Page v. Greeley*, 75 Ill. 400; *Hoback v. Kilgores*, 26 Gratt. 442; *Thayer v. Torrey*, 37 N. J. Law, 339; In *McGlynn v. Maynz*,

ment to sell and convey land contains an implied condition that the vendor's title is a good one.(1) And in England, there is the further implied condition that the vendor shall deliver up the title deeds.(2) The title to be shown by the vendor depends upon and varies with the nature of the estate contracted to be sold, whether—for example, it is a fee simple, or a leasehold, and the like.(3) The condition as to the vendor's showing a good title is raised by the law solely for the benefit of the vendee, and may, therefore, be waived by him, even though the vendor may object to such waiver, and may insist upon the condition being enforced for the purpose of preventing a specific performance of his contract.(4) In the United States, a contract for the sale and conveyance of land, besides the condition as to a good title, farther implies that the vendor will execute and deliver a deed with a general covenant of warranty as the instrument of conveyance.

SEC. 156. An agreement to renew a lease implies that the new lease is to be for the same term as the former one.(5) An agreement

104 Mass. 263, an agreement to convey in fee, with full covenants, etc., is not satisfied by a conveyance with conditions restricting the erection or use of buildings on the land; *Dresel v. Jordan*, 104 Mass. 407, an agreement to convey, subject to a mortgage which is to be assumed by the vendee as part of the consideration, held not satisfied by conveying subject to a condition that the grantee (vendee) shall indemnify the grantor against the mortgage. *Roberts v. Bassett*, 105 Mass. 409, a contract to convey with "a clear title," held not to be satisfied by giving a warranty deed if the land is actually incumbered. *Steinburg v. Ismay*, 35 N. Y. Sup'r Ct. 35, a contract to convey free from incumbrance, is not performed by tendering a deed with release of the vendor's wife's dower right.

(1) *Doe d. Gray v. Stanion*, 1 M. & W. 695, 701; *Worthington v. Warrington*, 5 C. B. 635; *Bates v. Delavan*, 5 Paige, 299; *Watts v. Waddle*, 1 McLean, 200; *Allen v. Atkinson*, 21 Mich. 351; *Holland v. Holmes*, 14 Flor. 390; *Page v. Greeley*, 75 Ill. 400.

(2) Where such delivery was rendered impossible after the contract, by an accidental destruction of the deeds, it was held that the contract could not be specifically enforced by the vendor. *Bryant v. Busk*, 4 Russ. 1. Our system of registry has so completely revolutionized the law and practice of conveying in this country, that no such implied condition is attached to a contract for the sale of land in the United States.

(3) *Curling v. Flight*, 6 Hare, 41; 2 Phil. 613. On a contract for the sale of a lease in England, the title which the vendor must show to be good, includes that of the lessor. *Fildes v. Hooker*, 2 Meriv. 424; *Souter v. Drake*, 5 B. & Ad. 992; *Hall v. Betty*, 4 Man. & Gr. 410; *Kintrea v. Preston*, 25 L. J. Ex. 287; but the sale of a bishop's lease is excepted. *Fane v. Spencer*, 2 Mer. 430, *n.* Whether such condition is implied in similar contracts by the law of this country, *Query*. There seems to be no reason why it should not be.

(4) *Bennett v. Fowler*, 2 Beav. 302.

(5) *Price v. Assheton*, 1 Y. & C. Ex. 82. In a contract to assign a municipal corporation tax lease, there is no implied warranty of title by the vendor; he

by a lessee to give an underlease, implies that it shall be subject to the covenants contained in the superior lease under which it is granted.(1) Whether, in executory agreements for the making of more formal contracts, there is an implied term that the latter contract when executed shall contain all the provisions usually found in instruments of that class, is a question which has been raised, but apparently not yet settled in England.(2)

§ 157. The very nature of an implied term assumes that the contract contains no express clause or stipulation concerning the same matter, which would obviate, take the place of, or defeat the implication; that, in short, the language of the contract is silent on the subject. An implied term may, therefore, be displaced and destroyed by the express provisions of the agreement; as, for a familiar example, a contract for the sale of land may contain any stipulations concern-

only warrants its genuineness and his ownership; and the vendee is presumed to take it at his own risk in respect to the title, *Boyd v. Schlesinger*, 59 N. Y. 301.

(1) *Cosser v. Collinge*, 3 My. & K. 283; *Smith v. Capron*, 7 Hare, 185. Since so large a portion of business and dwelling-house property in England is leasehold, and these lettings are generally for considerable terms, the questions growing out of leases, sub-leases, and contracts to give them are more practically important and numerous there than in this country. As a contract for a sub-lease implies that it is to be taken subject to the covenants of the first lease, the question arises whether it is also implied that these covenants are only the ones usually inserted in leases. *Cosser v. Collins*, *supra*, held that it was the duty of the sub-lessee to inquire into the covenants of the superior lease, and this seems to be against such an implication; but the case of *Flight v. Barton*, 3 My. & K. 282, seems to indicate a different doctrine, namely, that if the contract for a sub-lease was silent in respect to the covenants, and the sub-lessee had not taken possession, and had had no notice, then if it turned out that the superior lease contained unusual covenants, the specific performance would not be forced upon him against his will. It is certain, however, that if any such implication arises as to the nature of the covenants, it is a slight one, and easily rebutted, either by the sub-lessee's taking possession, since he ought to find out what the superior covenants are before he does so; or by notice, actual or constructive—as, for example, by the sub-lessee's solicitor having seen the superior lease, which would be notice to him and to his client of all the covenants which it contains. *Cosser v. Collins*, 3 My. & K. 283; *Smith v. Capron*, 7 Hare, 185.

(2) See *Harding v. Metrop. Ry. Co.*, L. R. 7 Ch. App. 154; *Ricketts v. Bell*, 1 DeG. & Sm. 335, per *Knight Bruce*, V. C. For example, whether a contract for a lease implies that the lease shall contain the usual covenants; whether the brief memorandum of a sale implies that the formal contract when drawn up shall contain the stipulations customary as to showing title and the like. This question has not arisen in its general form in the United States, probably because it cannot be said that there are any settled custom as to what contracts, leases, etc., shall contain. In one of its special applications, however, the rule has been thoroughly settled, that a contract for the sale of land implies that the deed shall contain the ordinary covenant of warranty. (See *ante*, § 155.)

ing the title to be shown by the vendor and accepted by the vendee, and thus defeat the presumption as to a good title; or may require the purchaser to be satisfied with quit-claim deed, and thus remove the implication respecting a warranty. And, in this manner, all the implications can be obviated.(1) Again, a notice received at or before the time of entering into the agreement, by the purchaser or lessee, of the real state of the title, or of the actual interest or condition of the vendor or lessor, will destroy any implications as to the title or the nature of the estate to be conveyed or assigned, which might otherwise have arisen; since these implied terms do not arise from the express agreement of the parties, but from operation of law, and therefore their effect rests upon the same foundation as that of notice.(2) For example, if a vendor contracted to sell land generally, but the purchaser had notice that he held only a leasehold interest, the implication which would otherwise have arisen that he was to convey the fee, would be rebutted.(3) But if the vendor had actually contracted to convey the fee, such notice would not effect the stipulation.

SEC. 158. It being a settled doctrine that a contract must be complete in order to be specifically executed, the practical question arises: At what time must this quality of completeness exist? Is it enough that the agreement is perfected at any time before the hearing or the decision, or must it be complete in its terms at the time when the suit for its enforcement is commenced? As this quality is essential to the existence of a cause of action, and as a cause of action must have accrued before the suit is brought, it follows that the time at which the completeness must be ascertained, is the commencement of the action; or, in the old chancery practice, the filing of the bill.(4) If the defendant had a good legal or equitable ground for resisting performance and defending the suit when it was instituted, it would be manifestly unjust to deprive him of this defense, and thus wholly change his legal condition, by any subsequent acts for which he was not responsible.(5) This being the general rule, there are two excep-

(1) *Freme v. Wright*, 4 Mad. 364.

(2) *Ogilvie v. Foljambe*, 3 Meriv. 53, 64; *James v. Litchfield*, L. R. 9 Eq. 51. A notice of a contrary condition of circumstances does not, however, effect the express provisions of a contract. *Barnett v. Wheeler*, 7 M. & W. 364.

(3) *Cowley v. Watts*, 17 Jur. 172.

(4) *Adams v. Broke*, 1 Y. & C. C. C. 627.

(5) *Right v. Cuthell*, 5 East, 491; *Doe. d. Mann v. Walters*, 10 B. & C. 626; *Doe. d. Lyster v. Goldwin*, 2 Q. B. 143. In a case upon a contract, when the consent of a third person was necessary to its completion, and this consent was not given before the suit, the giving it after the suit was brought, and before the hearing, was held too late. *Adams v. Broke*, *supra*.

tions, which are, however, rather apparent than real, since in neither instance is the contract actually incomplete at the commencement of the action. The first is the case already discussed,(1) where the contract provides for some act to be done by third persons—as the fixing the price by valuers—or for some analogous proceeding to be taken; but this provision is not an essential part of the agreement, but rather incidental and subsidiary, so that relief will not be refused if it is not liberally complied with; under these circumstances, if through neglect of the defendant, or from any other cause other than the plaintiff's own default, the provision has not been carried into effect, the court will, as a preliminary to its decree, and as a step in the cause, provide a substituted method for accomplishing the object of the provision, and completing the agreement.(2) The second is the case, also described heretofore, where a contract contains a term which is not, in itself, full and definite, but complies with the maxim, *id certum est*, etc. Such a contract will be enforced, although the court, as has been shown, must, in the progress of the suit, resort to extrinsic evidence for the purpose of explaining the term, applying the references which it makes, and identifying the persons, things or language to which it refers.(3) Such a contract, however, is plainly as complete as one in which all the terms are expressed in a minute and detailed manner.

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## SECTION VI.

### *The contract must be certain.*

SECTION 159. As stated in the preceding section, the quality of certainty now to be considered denotes that the contract not only contains all the material terms, but that each one of them is expressed in a sufficiently exact and definite manner. An uncertain contract, therefore, may perhaps embrace, in a partial manner, all the material terms, but on account of the inexact, indefinite, or

(1) *Ante*, § 151.

(2) *Pritchard v Ovey*, 1 J. & W. 396; *Lord Kensington v. Phillips*, 5 Dow. 61. Agreement to grant an annuity for three lives to be named; the consideration was paid; defendant refused to do anything, and so the lives were not named; the court directed the plaintiff to nominate the lives, and thus to perfect the agreement so that it could be specifically executed. See, also, the cases in §§ 150, 151.

(3) *Walker v. Eastern Counties Ry. Co.*, 6 Ha. 59. *Owen v. Thomas*, 3 My. & K. 353; *Monro v. Taylor*, 8 Ha. 51. See, also, cases *ante*, § 153.



obscure language in which one or more of them is stated, it fails to express the intent of the parties with sufficient clearness to enable the court of equity to enforce its provisions. The specific performance of an agreement, thus uncertain, will not be decreed. No criterion can be formulated which shall be a test of certainty in every instance. As a general proposition, although it is perhaps too vague to be of much practical use, the terms of a contract must be expressed with a reasonable certainty, and what is reasonable in any case must depend upon the subject-matter of the agreement, the purpose for which it was entered into, the situation and relations of the parties, and the circumstances under which it was made.(1) A greater amount or

(1) *Marsh v. Milligan*, 3 Jur. (N. S.) 979, per PAGE WOOD, V. C.; *Swaissland v. Dearsley*, 29 Beav. 430; *Tillett v. Charing Cross Bridge Co.*, 26 Beav. 419; *Morrison v. Barrow*, 1 DeG. F. & J. 633; *Taylor v. Portington*, 7 De G. M. & G. 328; *Price v. Salusbury*, 32 Beav. 446; 32 L. J. (N. S.) Ch. 441; *Allen v. Webb*, 64 Ill. 342; *Reese v. Reese*, 41 Md. 554; *Tallman v. Franklin*, 4 Kern. 584; *Neufville v. Stuart*, 1 Hill Ch. 159; *Bell v. Bruen*, 1 How. (U. S.) 169, 173; *Pearce v. Watts*, L. R. 20 Eq. 412. Contract for sale of an estate, vendor reserving "the necessary land for making a railway" through the estate to a place named. *Held*, in action for a specific performance by the vendor, that the reservation was so uncertain, that it made the contract incapable of enforcement. The following are additional cases illustrating the general doctrine of the text. *Stanton v. Miller*, 58 N. Y. 192. A. agreed, in consideration of services to be performed by B. and his family, to convey a house and lot to such member of B.'s family as A. should select. *Held*, the agreement was so uncertain in respect to the person who was to be the grantee, that it could not be specifically enforced. *Mehl v. Von der Wulbeke*, 2 Lans. 267; *Foot v. Webb*, 59 Barb. 38; *Munsell v. Loree*, 21 Mich. 491; *Tiernan v. Gibney*, 24 Wisc. 190; *Bowman v. Cunningham*, 78 Ill. 48; *Miller v. Campbell*, 52 Ind. 125; *Lynes v. Hayden*, 119 Mass. 482; *Mastin v. Halley*, 61 Mo. 196; *Odell v. Morin*, 5 Oreg. 96 (the objection of uncertainty is applied with special strictness against the assignees and representatives of the original parties); *Johnson v. Johnson*, 16 Minn. 512; *McClintock v. Laing*, 22 Mich. 212; *Nichols v. Williams*, 7 C. E. Green, 63 (an agreement to give two mortgages for part of the price of land, which did not state when they were to be paid, or at what rate of interest, *held* too uncertain to be enforced); *Carr v. Passaic Land, etc., Co.*, 7 C. E. Green, 85; 4 ib. 424; *Pierce v. Catron*, 23 Gratt. 588; *Long v. Duncan*, 10 Kans. 294; *Hardesty v. Richardson*, 44 Md. 617; *Hoyt v. Tuxbury*, 70 Ill. 331; *Brink v. Steadman*, 70 Ill. 241; *Wright v. Wright*, 31 Mich. 380; *McKibbin v. Brown*, 1 McCarter, 13; *Hyde v. Cooper*, 13 Rich. Eq. 250; *Welsh v. Bayaud*, 6 C. E. Green, 186; *White v. Hermann*, 51 Ill. 243; *Matteson v. Scofield*, 27 Wisc. 671; *Soles v. Hickman*, 8 Harris, 180; *Potts v. Whitehead*, 5 C. E. Green, 55; *Camden, etc., R. R. v. Stewart*, 3 C. E. Green, 489; *Van Doren v. Robinson*, 1 C. E. Green, 256; *King v. Ruckman*, 5 C. E. Green, 316; *Ferris v. Irving*, 28 Cal. 645; *Agard v. Valencia*, 39 Cal. 292; *Minturn v. Baylis*, 33 Cal. 129; *McGuire v. Stevens*, 42 Miss. 724; *Hammer v. McEldowney*, 46 Pa. St. 334; *Whelan v. Sullivan*, 102 Mass. 204; *Myers v. Forbes*, 24 Md. 593; *Gelston v. Sigmund*, 27 Md. 334; *Dobson v. Litton*, 5 Coldw. 616; *Huff v. Shepard*, 58 Mo. 242; *Buckmaster v. Thompson*, 36 N. Y. 558; *Wiswall v. Tefft*, 5 Kans. 263.

degree of certainty is required in the terms of an agreement, which is to be specifically executed in equity, than is necessary in a contract which is to be the basis of an action at law for damages. An action at law is founded upon the mere non-performance by the defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of non-performance is not enough; its object is to procure a performance by the defendant, and this demands a clear, definite, and precise understanding of all the terms; they must be exactly ascertained before their performance can be enforced. This quality of certainty can best be illustrated by examples selected from the decided cases, and a number of these are collected in the footnote.(1)

(1) *Kendall v. Almy*, 2 Sumn. 273; *Colson v. Thompson*, 2 Wheat. 336; *Carr v. Duval*, 14 Pet. 77; *Walton v. Coulson*, 1 McLean, 120; *McMurtre v. Bennette*, Harring. Ch. 124; *Millard v. Ramsdell*, Harring. Ch. 373; *Prater v. Miller*, 3 Hawkes, 628; *Waters v. Brown*, 7 J. J. Marsh. 123; *Fitzpatrick v. Beatty*, 1 Gilm. 454; *Goodwin v. Lyon*, 4 Porter, 237. An agreement between two railway companies, that one should have the right of running with their engines, carriages and trucks, and carrying traffic upon the line of the other, was held not too uncertain to be enforced. *Great Northern Railway Co. v. Manchester, etc., Railway Co.*, 5 DeG. & Sm. 138, per PARKER, V. C. "It means a reasonable use—a use consistent with the proper enjoyment of the subject-matter, and with the rights of the granting party." *Catt v. Tourle*, L. R. 4 Ch. 654; *Baumann v. James*, L. R. 3 Ch. 508; *Collins v. Plumb*, 16 Ves. 454; *White v. Hermann*, 51 Ill. 243; *Joseph v. Holt*, 37 Cal. 250. The following agreements have been held too uncertain to admit of specific enforcement: Marriage articles drawn by a Jewish rabbi in an obscure manner, but after a form said to be in use among the German Jews (*Franks v. Martin*, 1 Ed. 309); a contract for the sale of land, where a plan to be incorporated into it was not authenticated so as to be free from doubt (*Hodges v. Horsfall*, 1 Russ. & Myl. 116); an agreement by an actor to perform at a theatre. *Kemble v. Kean*, 6 Sim. 333, 337. "Independently of the difficulty of compelling a man to act, there is no time stated, and it is not stated in what character he shall act; and the thing is altogether so loose, that it is perfectly impossible for the court to determine upon what scheme of things Mr. Kean shall perform his agreement." A contract for the purchase, by a railway company, of "the land required" for its construction, which also contained stipulations as to roads, culverts, etc., was held too uncertain for enforcement by the lord justices, on appeal. *Lord James Stuart v. London & North-Western Railway Co.*, 1 DeG. M. & G. 721, per KNIGHT BRUCE, L. J. "The language is too vague, too uncertain, too obscure to enable this court to act with safety or propriety." The M. R., in 15 Beav. 513, had held that a surveyor going on the ground with the contract before him could ascertain accurately the land to be taken, and therefore the terms were sufficiently certain to be enforced. Also, an agreement drawn in general terms for the construction of a railway, according to the terms of a specification to be prepared by the engineer of the company for the time being, was held too vague,

SEC. 160. If the terms of a contract are contradictory and conflicting with each other in their effect, and when there are two different agreements between the parties concerning the same subject-matter, the necessary result is an uncertainty which prevents a court of equity from decreeing a specific execution.(1) The doctrine that where an agreement is uncertain a specific performance will be refused, is applied by the courts, it would seem, with more vigor against assignees and representatives of the original contracting parties than against those parties themselves.(2)

SEC. 161. Where the terms which the parties have expressed in their contract are general, and the subordinate details will be supplied or inferred by the law, the agreement will thereby be rendered sufficiently certain; the vagueness and obscurity, which might result from the generality of the express provisions, are obviated by the legal implications.(3) The rule in this respect is the same as that concerning the analogous quality of completeness. The principle of the maxim, *est certum est quod reddi certum potest*, will often remove the objection of uncertainty which might otherwise have been fatal. If

obscure, and uncertain to be enforced. *South Wales Railway Co. v. Wythes*, 5 DeG. M. & G. 88J. Also an agreement, in very general terms, to give the plaintiffs accommodations for the sale of their articles in the refreshment rooms of the defendants, and to furnish them with the necessary appliances. *Paris Chocolate Co. v. Crystal Palace Co.*, 3 Sm. & Gif. 119; *Williamson v. Woolton*, 3 Drew. 210; *Smith v. Ankrum*, 13 S. & R. 19; *Harnett v. Yielding*, 2 Sch. & Lef. 549; *Tatham v. Platt*, 9 Hare, 660; *Taylor v. Gilbertson*, 2 Drew. 391; *Holmes v. Eastern Co. Ry. Co.*, 3 K. & J. 675; *Sturge v. Midland Ry. Co.*, W. R. (1857-8) 233; *Wilson v. Northampton, etc., Railway Co.*, L. R. 9 Ch. 279; *Hood v. North-Eastern Railway Co.*, L. R. 5 Ch. 525

(1) *Callaghan v. Callaghan*, 8 Cl. & Fin. 374; *Taylor v. Portington*, 7 DeG. M. & G. 328. In the latter case an offer was made by an intended lessee to take a house for a specified term, at a specified rent, *if it was put into thorough repair*—and the offer went on to state that the drawing-rooms would be required to be handsomely decorated, according to the present style, and added some further requirements as to the painting—the offer was accepted. The court of appeals held that the provisions in the contract concerning the repairs were indefinite and apparently incongruous—at all events the vagueness and uncertainty were such that the agreement could not be specifically executed.

(2) *Kendall v. Almy*, 2 Sumn. 178; *Montgomery v. Norris*, 1 How. (Miss.) 499.

(3) *South Wales Ry. Co. v. Wythes*, 5 DeG. M. & G. 888, per TURNER, L. J. In *Sanderson v. Cockermouth, etc., Ry. Co.*, 11 Beav. 497, a contract between the railway company and a land owner to make such roads, ways, and steps for cattle as might be necessary, was held capable of being performed, after the company had taken possession of the land and built their railway. See, also, *Parker v. Taswell*, 4 Jur. (N. S.) 183, per STUART, V. C. See, for example, as to the force of the covenant that the party “would settle.” *Lee v. Lee*, L. R. 4 Ch. D. 175, per JESSEL, M. R.

a term vague, obscure, or imperfect in its language can be made certain by means of references by itself or by other portions of the agreement, the requirements of the rule are fully satisfied and a specific performance will be granted.(1) If an agreement consists of two parts which are separable, so that one portion could be enforced by itself, it will be no objection to a specific execution of one such part that the other is too uncertain to admit of the same remedy.(2) Parol evidence, however, is only admissible to a very limited extent, and for purposes well defined and limited. It cannot be used to supply any gap or omission in the terms of a written contract; it is strictly confined, in cases where no fraud, mistake, or other equitable incident of a similar character is alleged, to the function of explanation, and of exhibiting the surrounding circumstances, as is permissible in the interpretation of all written instruments.(3) Parol

(1) *Prater v. Miller*, 3 Hawkes, 628. In *Wiswall v. McGowan*, 1 Hoff. Ch. 126, it was held that where a contract refers to the subject-matter by vague and insufficient description, the defect may be supplied by other documents coming from or adopted by the party against whom the contract is to be enforced, pending, and connected with the transaction. As to the use of parol evidence in explaining an uncertain contract, see *Fowler v. Redican*, 52 Ill. 405.

(2) *Sarter v. Gordon*, 2 Hill Ch. 121. A. had purchased of B. certain property at a low price, and agreed, among other things, to convey to the children of B., on being repaid the purchase-price and interest. Although the agreement contained other provisions, which were held too uncertain to admit of equitable relief, this provision for the conveyance to B.'s children was held separable and certain, and a specific performance of it was decreed.

(3) *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273; 14 Johns. 32; *Talman v. Franklin*, 3 Duer, 395; 4 Kern. 584; *Foot v. Webb*, 59 Barb. 33; *Lobdell v. Lobdell*, 36 N. Y. 327; *Buckmaster v. Thompson*, 36 N. Y. 558; *Waring v. Ayres*, 40 N. Y. 357; *Seitzinger v. Ridgway*, 4 W. & S. 472; *Soles v. Hickman*, 8 Harris, 180; *Nichols v. Williams*, 7 C. E. Green, 63; *Stoddert v. Tuck*, 5 Md. 18; *Baker v. Glass*, 6 Munf. 212; *Graham v. Call*, 5 Munf. 396; *Willis v. Forney*, 1 Busbee Eq. 256; *Aday v. Echols*, 18 Ala. 353; *Jordan v. Deaton*, 23 Ark. 704; *Sheid v. Stamps*, 2 Sneed, 172; *Madeira v. Hopkins*, 12 B. Mon. 595; *Munsell v. Loree*, 21 Mich. 491; *McClintock v. Laing*, 22 Mich. 212; *Farwell v. Lowther*, 18 Ill. 253; *Taylor v. Williams*, 45 Mo. 80; *Minturn v. Baylis*, 33 Cal. 129. In *Parrish v. Koons*, 1 Park. Eq. Cas. 79, the doctrine is so carefully examined and stated that I shall quote from the opinion, especially as its conclusions require, I think, to be taken with some limitation: "To constitute an adequate written agreement for the sale of lands within the statute, it is necessary that it should state the terms of the contract with reasonable certainty, so that the substance of it can be made to appear and to be understood from the writing itself, without having recourse to parol proof. An agreement defective in certainty cannot be supplied by parol proof, because that would at once open the door to perjury, and introduce all the mischiefs which the statute was intended to prevent. A contract cannot rest partly in writing and partly in parol. Unless the essential terms of the bargain and sale can be ascertained from the writing itself, or by a reference contained in

evidence may always be resorted to for the purpose of explaining the position of the parties and of the subject-matter and other surround-

it to something else, the writing is not a compliance with the statute. *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273. If a contract be vague and uncertain, a court of equity will not exercise its extraordinary jurisdiction, but will leave the party to his legal remedy. *Colson v. Thompson*, 2 Wheat. 341; *Abeel v. Radcliff*, 13 Johns. 297. In *Reed's Heirs v. Hornback*, 4 J. J. Marsh, 377, it was ruled that specific execution of a contract will not be enforced unless the parties have described and identified the particular tract, or unless the contract furnishes the means of identifying with certainty the land to be conveyed. Other American cases on the doctrine will be found in *Elis v. Deadman's Heirs*, 4 Blyb. 467; *Kendall v. Almy*, 2 Sumn. 278; *Carr v. Duval*, 14 Peters, 77. And whether the instrument from which the contract is sought to be deduced is a receipt for a deposit, earnest or purchase-money, it must contain the same requisites to bring it within the statute. In *Blagden v. Bralbear*, 12 Ves. 433, it was held by the M. R., that although an auctioneer's receipt for the purchase-money may amount to a sufficient note or memorandum of an agreement within the statute, yet, *for that purpose*, the receipt must contain within itself, or by reference to something else, what the agreement is. This doctrine had previously been strongly intimated by Lord ELDON, in *Coles v. Trecothick*, 9 Ves. 252, 253. The application of these principles to the case before the court seems decisive against the plaintiff. The only written memoranda of the original contract are found in the defendant's proposal and the plaintiff's receipt, which are considered by the plaintiff as forming one instrument. The absolute insufficiency of these documents, to constitute any definite contract of themselves, appears best from simply reciting them. They are as follows: 'The most is 3,700, subject to 3,000 mortgage. No taxes or other liens (except the mortgage), will be allowed. Received ten dollars on account of the purchase. The mortgage to be removed from the Fifth street lot as soon as the title is made, without delay. R. A. Parrish, for Isaac Koons, R. T.' Can anything be extracted from such papers from which a court of chancery can advisedly decree a specific performance? Where is the estate bargained for? What is the quantity of land to be conveyed? What is the kind of estate to be conveyed? Without associating these papers with the parol evidence in the case, it is impossible to extract anything intelligible from them. This is, as has been seen, wholly inadmissible. Every agreement which is required by the statute of frauds to be in writing, must be certain in itself, or capable of being made so by reference to something else whereby the terms can be ascertained with reasonable precision, or it cannot be carried into effect." Although this decision was probably correct upon the facts, yet the general doctrine is stated somewhat too broadly, and in a manner hardly reconcilable with several of the recent cases, American and English, quoted in the present section, and in that which treats of "Completeness." It is not strictly accurate to say that the subject-matter must be absolutely certain from the writing itself, or by a reference to some other writing. The true rule is, that the situation of the parties and of the surrounding circumstances, when the contract was made, can be shown by parol evidence, so that the court may be placed in the position of the parties themselves; and if *then* the subject-matter is identified, and the terms appear reasonably certain, it is enough. The question, what kind of estate is conveyed? is answered by the rule that in an agreement to convey, silent in respect to the estate, it is implied that the vendor is to convey the whole estate which he has—the fee.

ing circumstances at the time of concluding the contract, so that the court may be put into the position of the parties, may see with their eyes, and may understand the force and application of the language employed by them. In this manner the subject-matter may always—as in the interpretation of a will or a deed—be ascertained and identified. For example, a contract by which the vendor agreed to sell “my mill,” or even “the mill,” would be made sufficiently certain, and the subject-matter clearly identified, by proof, that at the time the vendor owned a mill and but one mill. Such a description would then be as unmistakable as the most elaborate method of fixing and locating the structure. In fact, however detailed the description, there must always be a resort to some parol evidence, either in the form of direct proof, or of tacit admission or assumption by the parties.(1)

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#### SECOND GROUP.

*Those incidents and qualities which do not primarily involve the validity of the contract, but which directly affect the right to the equitable remedy upon the principle that he who seeks equity must do equity.*

#### SECTION VII.

*The contract must be mutual.*

SECTION 162. The requisite of mutuality, taken in its most general sense, includes both a mutuality of legal right and a mutuality in the equitable remedy. So far as it relates to the legal rights of the parties, this quality belongs more properly to the class discussed in the preceding sections, since it may directly affect the validity of

(1) *Fish v. Hubbard*, 21 Wend. 652; *Robeson v. Hornbaker*, 2 Green Ch. 60; *Aldridge v. Eshleman*, 10 Wright, 420; *Barry v. Coombe*, 1 Peters, 640. In the last-named case the description of the property sold was “your half E. B. wharf.” In a suit for a specific performance, the uncertainty of this description being urged as a defense, the court said: “That for anything which appeared on the face of the instrument, ‘E. B. wharf,’ may be as definitive a description of locality as ‘F. street;’ and then there would be no ambiguity, unless the vendor had more than one house on F. street.” See, however, the case of *Hammer v. McEldowney*, 10 Wright, 334, where the court refused to enforce a contract for the sale of “the houses on Smithfield street,” although it was shown that the defendant owned two houses on that street, and no more. There were, however, some other circumstances which the court thought rendered the contract uncertain as to the amount of the land intended to be sold; but the case stands in marked opposition to the general current of authority upon this subject.

contracts. Practically, however, it is the mutuality in the right of the respective parties to the equitable remedy with which we are more immediately concerned in cases of specific performance, and this has no *necessary* connection with the legal validity of the agreement. For this reason, and to avoid a useless repetition, I shall depart somewhat from a strictly logical arrangement, and discuss the entire subject in the present connection.

SEC. 163. It has been frequently laid down as the general rule governing cases of specific performance, although, as will be seen, there are many exceptions, that, as a condition to granting the equitable relief, the contract must be mutual in both the senses above described; that is, the contract must be of such a nature that both a right arises from its terms in favor of either party against the other, while the corresponding obligation rests upon each towards the other; and also that either party is entitled to the equitable remedy of a specific execution of such obligation against the other contracting party. It is not then sufficient, in general, that a valid and binding agreement exists, and that an action at law for damages will lie in favor of either party for a breach by the other; the peculiarly distinctive feature of the equitable doctrine is, that the remedial right to a specific performance must be mutual. If, therefore, from the nature or form of the contract itself, from the relations of the parties, from the personal incapacity of one of them, or from any other cause, the agreement devolves no obligation at all upon one of the parties, or if it cannot be specifically enforced against him, then and for that reason he is not, in general, entitled to the remedy of a specific performance against his adversary party, although otherwise there may be no obstacle arising, either from the terms of the contract or from his personal status and relations, to an enforcement of the relief against the latter individually.(1)

(1) *Bromley v. Jefferies*, 2 Vern. 415; *Rogers v. Saunders*, 16 Me. 92; *Benedict v. Lynch*, 1 Johns. Ch. 370; *German v. Machin*, 6 Paige, 288; *Woodward v. Harris*, 2 Barb. 439; *Phillips v. Berger*, 2 Barb. 611; 8 Barb. 527; *Bodine v. Glading*, 21 Pa. St. 50; *Duvall v. Myers*, 2 Md. Ch. 401; *Tyson v. Watts*, 1 Md. Ch. 13; 7 Gill. 124; *Beard v. Linthicum*, 1 Md. Ch. 345; *McMurtrie v. Bennette*, Harring. Ch. 124; *Hawley v. Sheldon*, Harring. Ch. 420; *Cabeen v. Gordon*, 1 Hill Ch. 51; *Bronson v. Cahill*, 4 McLean, 19; *Reese v. Reese*, 41 Md. 554; *Marble Co. v. Ripley*, 10 Wall. 339; *Meason v. Kaine*, 13 P. F. Smith, 335; *Geiger v. Green*, 4 Gill. 472, 476; *Moore v. Fitz Randolph*, 6 Leigh, 175. In *Duvall v. Myers*, *supra*, this general doctrine was thus stated by the court: "The right to a specific execution of a contract, so far as the question of mutuality is concerned, depends upon whether the agreement itself is obligatory upon both parties, so that upon the application of either against the other, the court would coerce a specific per-

SEC. 164. Among the most frequent illustrations of this doctrine, a contract between an infant and an adult cannot be specifically enforced; because, as the remedy will not be decreed against the infant, it cannot be awarded in his favor.(1) Where a vendor had, at the time of making the agreement, no estate in the land which he contracted to convey, so that a specific performance could not then be enforced against him, this want of mutuality in the remedy furnishes a sufficient defense to the purchaser against any suit which may be brought by the vendor after he has obtained the title.(2) There is, also, a large class of contracts in which the stipulations on the part of the plaintiff provide for the doing of personal, confidential, or continuous acts, such as the discharge of official or quasi-official duties, the performance of fiduciary functions, like those of agency, the construction, maintaining, or operating of railways and other works of a similarly extensive character, all of which are in general beyond the competency of a court of equity to specifically execute by its decree, while the stipulations on the part of the defendant call for acts of a more simple, single, and direct nature—perhaps, even, the mere pay-

formance. A party, not bound by the agreement itself, has no right to call upon this court to enforce performance against the other contracting party by expressing his willingness in his bill to perform his part of the agreement. His right to the aid of the court does not depend upon his subsequent offer to perform the contract on his part, but upon its originally obligatory character." This doctrine is affirmed by a multitude of judicial decisions; but there are so many well-established exceptions, embracing large and important classes of agreements, that the rule of mutuality, especially in respect to the *obligation*, cannot be called universal. See *Richards v. Green*, 8 C. E. Green, 32, 35; *Justice v. Lang*, 42 N. Y. 493. It may be stated, however, as a general proposition, that whenever the contract was intended to bind *both* of the parties, and for any reason one of them is not bound, he cannot compel performance by the other. See *Butman v. Porter*, 100 Mass. 337; *Sullings v. Sullings*, 9 Allen, 234.

(1) *Flight v. Bolland*, 4 Russ. 293; *Blanchard v. Detroit R. R.*, 31 Mich. 44. It has been held in Ireland, that a contract of sale by a husband and wife as vendors, and a third person as vendee, is not bad for want of mutuality, and may be enforced by the vendors. *Fennelly v. Anderson*, 1 Ir. Ch. R. 706.

(2) *Hogart v. Scott*, 1 R. & My. 293. In a suit for a specific performance brought by the vendors in a land contract, it appeared that a part of the plaintiffs only had agreed to make a good and sufficient title; this want of mutuality in the obligation was held a ground for denying the relief against the vendee. *Bronson v. Cahill*, 4 McLean, 19. In *Tyson v. Watts*, 1 Md. Ch. 13, the defendant B. had given the plaintiff A. the right to work as well as to explore the minerals on his farm; but A. was only bound to explore, and not to work the mines. As it was evident, from the whole contract, that B.'s main object was to have the mines on his land worked, this absence of mutuality of obligation, in respect to the most important particular, was held to be a defense and reason for not enforcing the contract.



ment of money—all of which are clearly enforceable *in specie* by the ordinary judicial proceeding. In agreements of this kind, there is no mutuality in the right to the equitable remedy, although each party may be clearly bound by a legal obligation, and, therefore, a specific performance is not granted even against those parties whose undertakings are, in themselves, easily susceptible of enforcement by the court.(1)

(1) Where the acts to be done by the plaintiff were personal, confidential, and semi-official. *Pickering v. Bishop of Ely*, 2 Y. & C. C. C. 249. Cases in which the acts to be done by the plaintiff were continuous, extensive, etc., like the construction or operating of railways or other works, *Johnson v. Shrewsbury & Birmingham Ry. Co.*, 3 De G. M. & G. 914; *Stocker v. Wedderburn*, 3 K. & J. 393; *Ord v. Johnston*, 1 Jur. (N. S.) 1063; *Hill v. Gomme*, 1 Beav. 540; *Van Sittart v. Van Sittart*, 4 K. & J. 62; but see *Hope v. Hope*, 22 Beav. 364, per Sir J. Romilly, M. R.; and S. C. on app. 26 L. J. Ch. 417; *Blackett v. Bates*, L. R. 1 Ch. 117, reversing 2 H. & M. 270. This was a suit to enforce an award which provided that defendant should execute to the plaintiff a lease (in terms set out in the award) of so much of a certain railway as was on defendant's land; and the award went on to provide—but these provisions were not inserted in said lease—that defendant should have the right of running carriages over the whole of plaintiff's road, on certain terms, and might require plaintiff to supply the engine power, and that plaintiff should keep the whole road in good repair. The plaintiff suing for a specific performance of defendant's part, which was simply to execute the lease, and could, therefore, be easily enforced; the court held that the provisions in favor of defendant could not be executed at once, but required certain duties to be continuously performed by the plaintiff, and that these could not be specifically enforced by the court; and as there was no mutuality in the remedy, the award could not be specifically performed *against* the defendant. *Merchant's Trading Co. v. Banner*, L. R. 12 Eq. 18. It should be remembered that contracts for construction of works will sometimes be enforced, and in such cases there would be no want of mutuality. The following are some further examples of agreements lacking the element of mutuality: A tenant-in-tail, it is held, cannot enforce a contract entered into by a tenant for life, because the contract could not be enforced against such tenant-in-tail. *Ricketts v. Bell*, 1 De G. & Sm. 335; *Armiger v. Clarke*, Bunb. 111. Again, A. having agreed with B. not to join in barring an entail, and B. having agreed to convey to A. certain parts of the estate on his entering into possession, it was held that the contract on his part could not be specifically enforced against A., and, therefore, a specific performance of B.'s agreement to convey was refused when demanded by A.'s representatives. *Hamilton v. Grant*, 3 Dow, 33; *Collins v. Plummer*, 1 P. Wms. 104. When a tenant for life, acting under a power to lease, has entered into an agreement to grant a lease with a third person, whether there is a mutuality of obligation between this third person and the remainderman, was doubted in some early cases; see *Campbell v. Leach*, Amb. 749, per De Grey, C. J.; but it is now settled that such a contract can be enforced by either of these parties—the lessee and the remainderman against the other. *Shannon v. Bradstreet*, 1 Sch. & Lef. 52, 64. See, also, as illustrating the rule that the equitable remedy must, in general, be mutual; *Mastin v. Halley*, 61 Mo. 196, the only consideration of a contract to convey land, was the vendee's undertaking to erect "a certain building" thereon;

SEC. 165. Mutuality in the equitable remedy is so essential that the converse of the proposition above stated is well established, and it is a familiar doctrine that if the right to the specific performance of a contract exists at all, it must be mutual; the remedy must be alike attainable by both parties to the agreement.(1) For this reason the purchaser's obligation in a contract for the sale of land, although nothing more, perhaps, than a liability to pay a certain sum of money,(2) may always be enforced by a suit in equity on behalf of the vendor, since the purchaser may, in the same manner, obtain the performance of the vendor's duty to convey.(3) On the same principle a person who has agreed to sell things in action—such as certain claims against a bankrupt debtor,(4) or an annuity,(5) or a patent-right—(6) may enforce the purchaser's promise to pay the price by a

as his undertaking could not be specifically enforced by the vendor, it was held that he was not entitled to a specific performance against the vendor. In *Schröder v. Gemeinder*, 10 Nev. 355, it was held that optional contracts and covenants to lease or to convey land, will be specifically enforced, although the remedy is not mutual, if such contract or covenant is shown to have been made upon a fair consideration, and where it forms part of an agreement or lease which constitutes its consideration. *Allen v. Cerro Gordo Co.*, 40 Iowa, 349. A contract for the conveyance of land in consideration of personal services to be performed by the vendee, held enforceable after the services had been rendered. In *Chamberlin v. Robertson*, 31 Iowa, 408, the vendee, in a contract for the sale of land, was a married woman; she had paid part of the purchase-money, taken possession, and made improvements; held, the vendor could not rely on any want of mutuality on the ground of the vendee's being a married woman; the contract could be enforced against her, and she could enforce it against the vendor. It may be remembered that by the statutes of Iowa a married woman is clothed with a large capacity to make contracts as though she were a single woman. In *Tarr v. Scott*, 4 Brews. (Pa.) 49, it was held, that as each party must have a right to the remedy against the other, a married woman cannot enforce the specific performance of a contract to which she is a party. In Pennsylvania the statutes have not changed the common-law capacity of the wife to the same extent as in Iowa.

(1) *Adderly v. Dixon*, 1 S. & S. 607; *Withy v. Cottle*, 1 S. & S. 174; *Kenney v. Wexham*, 6 Mad. 355, 357; *Cogent v. Gibson*, 33 Beav. 557; *Old Colony R. R. v. Evans*, 6 Gray, 25; *Cook v. Grant*, 16 S. & R. 198, 202.

(2) That such a suit in equity by the vendor is really an action for a money demand, see *Thames Plate Glass Co. v. Land, etc., Tel. Co.*, L. R. 11 Eq. 248, per MALINS, V. C.

(3) *Clifford v. Turrell*, 1 Y. & C. C. C. 138, 150; *Walker v. Eastern Counties Ry. Co.*, 6 Hare, 594; *Dalzell v. Crawford*, 1 Pa. L. J. Rep. 155. In Massachusetts, however, under the limited equity jurisdiction conferred by statute, it is held that an equity suit cannot be maintained by a vendor where the contract was to convey land for a certain price, on the ground that he has an adequate remedy at law. *Jones v. Newhall*, 115 Mass. 249.

(4) *Adderly v. Dixon*, 1 S. & S. 607.

(5) *Withy v. Cottle*, 1 S. & S. 174; *Kenney v. Wexham*, 6 Mad. 355, 357.

(6) *Cogent v. Gibson*, 33 Beav. 557.

suit in equity, because the purchaser, on his part, can compel an assignment of the things in action agreed to be sold.

SEC. 166. The time at which the mutuality must exist, in order that it may produce these binding effects, is that of concluding the agreement between the parties. The contract should properly be mutual *ab initio*. Two questions may arise concerning the time: 1. Whether the quality of mutuality, originally existing, must continue to the time of bringing the suit or rendering the decree? 2. Whether, if the quality did not originally exist, the objection would be obviated by subsequent acts or events which render the obligation and remedy mutual? In respect to the first of these questions, it is settled, upon the clearest principles of justice, that if the agreement possesses the requisite element of mutuality when it is concluded, so that the plaintiff can then maintain a suit for its specific execution, his right to such relief will not be subsequently defeated or diminished, because the defendant, through his delay or other acts or omissions, afterwards loses the right to enforce the contract against the plaintiff, which he originally had; a valid defense cannot thus arise from the defendant's own laches.(1) The same is true, it seems, when the original mutuality of remedy is lost by the subsequent happening of some contingent event not resulting from or connected with the conduct of either of the parties. In regard to the second of the questions proposed above, if the agreement, when concluded, lacks the mutuality of right and obligation, no subsequent event or act of the party seeking to enforce it, can obviate the objection and render it capable of specific execution. The right of a party to the equitable remedy depends upon the fact that the agreement was originally binding upon him, and not upon his subsequent willingness or offer to be bound and to perform the contract on his own part.(2) In respect to the remedy; however, a different rule prevails—or, at least, the rule is by no means so general and strict as that concerning the mutuality of right and obligation. It is, for example, a familiar doctrine that a vendor who, at the time of entering into the contract, has no valid title to the land he has undertaken to convey, and who is, therefore, then unable to

(1) *South Eastern Ry. Co. v. Knott*, 10 Hare, 122; *Hawkes v. Eastern Counties Ry. Co.*, 1 DeG. M. & G. 737, 755; 5 H. L. Cas. 331, 365; *Walton v. Coulson*, 1 McLean, 120. But see *Stuart v. London & North Western Ry. Co.*, 1 DeG. M. & G. 721, per Lord CRANWORTH.

(2) *Duvall v. Myers*, 2 Md. Ch. 401; *Bodine v. Glading*, 21 Pa. St. 50. This rule, as well as the previous ones stated in the text, it should be remembered, though general in their application, are subject to the exceptions which will be discussed in the subsequent paragraphs of the present section.

perform, may, upon his subsequently acquiring or perfecting the title, both enforce the agreement against the vendee, and be compelled to execute it at the suit of the purchaser.(1) There is a clear distinction in principle between the mutuality of right and obligation—that is, the binding efficacy of the agreement upon both the parties, and the mutuality simply of the equitable remedy—that is, the right of both the parties to obtain a specific performance. If the first does not exist when the parties have gone through the form of concluding their contract, it can hardly be said that any agreement at all has been made; any subsequent act, omission, or event which should create a mutuality of obligation, would virtually be the making of a new agreement. The mutuality of the equitable remedy, on the other hand, does not belong to the essence of the contract. An agreement may be perfect in its obligation upon both the parties, and yet be of such a nature that one of them only could be compelled, by a decree of the court, to specifically perform. As the absence of this kind of mutuality does not render the agreement any less obligatory, it would seem, on principle, that if the quality, originally lacking, should be subsequently supplied, in any practical manner, before the commencement of the suit, or even, perhaps, before the hearing, the objection would then be removed, and a specific enforcement would be thus made possible. For example, if the party who had undertaken to do acts, the performance of which could not be specifically compelled—such as the rendering of personal services—should fully perform all that he had agreed to do, and should then seek to enforce a specific execution of the contract by the other, it would seem, on principle, that all obstacle to granting the relief would have been removed. It cannot be said, however, that the decisions have accepted this distinction, although it seems to have been acted upon in some of the cases.(2)

SEC. 167 *Limitations upon the doctrine of mutuality.*—To the doctrine of mutuality, as stated and discussed in the foregoing paragraphs, there are limitations and exceptions of great importance, which very

(1) See *post*, §§ 341, 421, where this topic is treated at large.

(2) See *Allen v. Cerro Gordo Co.*, 40 Iowa, 349, in which a contract by the defendant to convey land in consideration of personal services to be rendered by the plaintiff, was specifically enforced at the suit of the vendee after the stipulated services had been performed by him. Of course, the defendant could not have compelled a specific execution of his part of the agreement by the plaintiff. But, *per contra*, see *Cooper v. Pena*, 21 Cal. 404, where upon the same facts, the remedy was refused, solely upon the ground that by the original terms of the contract it was not mutual; the plaintiff could not have been compelled to perform the services which he had promised.

much narrow its application. These exceptions are well established; many of them are common and familiar. It may not be easy, however, to formulate any rule or principle by which they can all be classified, or which shall furnish the means of determining, with certainty, the cases in which they arise. I shall collect and arrange the instances which have been settled by the decisions, and shall endeavor, if possible, to ascertain the principle upon which they depend.(1)

SEC. 168. The first class of contracts in which the equitable remedy is not mutual, and in which, perhaps, the legal obligation may be single, although not necessarily so, comprises those which are unilateral in form. This general class of unilateral contracts embraces many different species. It includes those which consist of a promise or promises by one party only, made upon some executed consideration which had proceeded from the promisee, but without any corresponding promise, either express or implied, by that other party. Of this kind are contracts in the form of a deed-poll,(2) or in the form of a bond,(3) or of an undertaking,(4) all of which may be specifically enforced, if falling within the rules otherwise applicable to the equitable remedy.

SEC. 169. Another most important and comprehensive species of these contracts unilateral in form, and which can be specifically enforced by the one for whose benefit they are made, although there is no mutuality in the remedy, embraces those in which the consideration is not passed and executed, but future, consisting in acts to be done by the promisee, although the agreements themselves contain no express promise on his part that he will do the acts. Among the examples of this species are those contracts by which the party, upon whom alone an obligation arising from the express stipulations rests,

(1) That a contract may be binding and enforceable in equity, although there is no mutuality of obligation resulting from the express terms of the instrument, is plain from the following very familiar examples. A covenant to stand seized is purely a unilateral obligation, but will be enforced. A covenant to convey on the payment of a sum of money (like the ordinary bond to convey) is binding, and will be specifically enforced, on the assent or acceptance of the one to whom the covenant is made, although he does not, by any terms of the contract, or by any promise, bind himself to pay the money. *Ewins v. Gordon*, 49 N. H. 444; *Jones v. Robbins*, 29 Me. 351; *Barnard v. Lee*, 97 Mass. 92; *Calvert v. Gordon*, 1 Man. & Ry. 494; 3 *id.* 424. Such a promise need not be under seal. A written offer to sell, or lease, or convey land at a certain price, becomes binding and enforceable, if assented to before it is withdrawn by the party to whom it is made. *Boston & Me. R. R. v. Bartlett*, 3 Cush. 224; *Mactier v. Frith*, 6 Wend. 104; *Corson v. Mulvany*, 13 Wright, 88, 99; *Perkins v. Hadsell*, 50 Ill. 216.

(2) *Otway v. Braithwaite*, Finch. 405.

(3) *Butler v. Powis*, 2 Coll. C. C. 156.

(4) *Palmer v. Scott*, 1 Russ. & My. 391.

covenants or promises to do or to forbear from some specified act upon the request of the other, and those by which the party making an offer, covenants or promises to do or to omit some act upon the assent or acceptance of the person to whom the offer is addressed, and those in which the party confers an option upon the other.(1) The

(1) *Chesterman v. Mann*, 9 Hare, 206; *Homfray v. Fothergill*, L. R. 1 Eq. 567 (a right of pre-emption); *Bell v. Howard*, 9 Mod. 302, 304; *Beatson v. Nicholson*, 6 Jur. 620. Bonds to convey, see *Jones v. Robbins*, 29 Me. 351; *Ewins v. Gordon*, 40 N. H. 444; *Barnard v. Lee*, 97 Mass. 92; *Corson v. Mulvany*, 13 Wright, 98; *Gordon v. Calvert*, 2 Sim. 253; 4 Russ. 581. Stipulations to lease, renew, or sell and convey upon the option or election of a lessee, see *Kerr v. Purdy*, 50 Barb. 24; 51 N. Y. 629; *Kerr v. Day*, 2 Harris, 112; *D'Arras v. Keyser*, 2 Casey, 249; *Napier v. Darlington*, 20 P. F. Smith, 64; *Mauglin v. Perry*, 35 Md. 352; *Souffrain v. McDonald*, 27 Ind. 269; *Willard v. Tayloe*, 8 Wall. 557; *Moss v. Barton*, L. R. 1 Eq. 474; *Hersey v. Giblett*, 18 Beav. 174; *Hawralty v. Warren*, 3 C. E. Green, 124. It is perfectly well settled that unilateral contracts, giving options and the like, are enforceable after the proffered conditions have been accepted by the party to whom the offer is made, although he was under no obligation to accept. It does not fall within the scope of this work to discuss, with any fullness, the mutual relations and obligations of the two parties to such a contract after acceptance. Even though the plaintiff is not bound by any express stipulation, an equitable duty certainly rests upon him, and when he seeks performance against the defendant, the court, in its decree, can always provide for a performance on *his own* part as the prerequisite to any relief. The following are some further illustrations of the doctrine as found in recent American decisions. In *Perkins v. Hadsell*, 50 Ill. 216, it is held that a written contract giving the vendee an option to buy land, upon the performance by him of certain conditions, namely, entering and making improvements, may be specifically enforced against the vendor, after the performance of such conditions by the vendee; and may also be then assigned in equity, and enforced by the assignee. *Schroeder v. Gemeinder*, 10 Nev. 355. Unilateral stipulations and covenants giving an option to lease or buy land will be specifically enforced, although the remedy is not mutual, when they are made upon a fair consideration. *Hall v. Center*, 40 Cal. 63. A covenant in a lease that the lessee shall have the privilege of purchasing the premises for a certain price, on or before the expiration of the term, will be specifically enforced against the lessor, when the lessee has, during the term, signified his acceptance and offered to perform. The defense being the want of mutuality, WALLACE, J., delivering the opinion of the court, said (p. 67), speaking of the general rule requiring mutuality: "But the exceptions to its operation are numerous. Lord REDESDALE, in *Lawrenson v. Butler*, 1 Sch. & Lef. 13, limits its application to a case 'where nothing has been done in pursuance of the agreement,' by which it is to be understood that though an agreement may, at the time it was entered into, lack the element of mutuality, and for that reason may not then be such an agreement as equity would enforce, yet if the party seeking relief has subsequently, with the knowledge and the expressed tacit consent of the other, placed himself in such a position that it would be a fraud for that other to refuse to perform, equity will relieve." To the same effect is the case of *De Rutte v. Muldrow*, 16 Cal. 505, and especially per BALDWIN, J., at page 513; also *Laffan v. Naglee*, 9 Cal. 662; *Maughlin v. Perry*, 35 Md. 352, a lessor covenanted with the lessee, his assigns, etc., to convey the premises for a specified

contracts of this kind are, in reality, conditional agreements. Upon the happening of the condition—that is, upon making the request, giving the assent, or declaring the option—they become absolute, and in many instances mutual in their obligation. In the face of such a large number of contracts in constant use which are specifically

price, at any time during the term; the filing a bill for a specific performance, with an offer to pay the stipulated price by an assignee of the lessee, was held to be a sufficient compliance with the terms of the covenant, and the covenant itself would be specifically enforced. *Ewins v. Gordon*, 49 N. H. 444, a bond to convey, signed alone by the vendor, and containing a penalty, is an agreement to convey which will be specifically enforced against him, although the vendee is not bound, or has not performed, provided he offers performance, the performance on his part can be secured in the decree. *Smith v. Fleekl's appeal*, 69 Pa. St. 474. A contract signed by the vendor alone, binding him to sell, but giving the vendee a specified period of time within which to accept or to refuse, will, after a timely acceptance by the purchaser, be specifically enforced at his suit; to the same effect is *Vassault v. Edwards*, 43 Cal. 458, which arose upon a similar contract, signed alone by the vendor, and binding himself to sell, but giving the vendee twenty days within which to accept or to refuse. See especially the observations of *Rhodes, J.*, pp. 464–466. In *Cooper v. Pena*, 21 Cal. 404, defendant made a written contract, in consideration of personal services to be rendered by the plaintiff, to convey to the plaintiff certain lands; the services were performed, and the plaintiff brought an action to compel a conveyance, but the relief was refused on the ground that the remedy must be mutual; that the mutuality is to be determined in general by the terms of the contract at its inception, and that the defendant could not have compelled a performance by the plaintiff. The whole doctrine is discussed at length by *Cope, J.*, pp. 411–413; but compare *Allen v. Cerro Gordo Co.*, 40 Iowa, 349. The effect of the general rule respecting mutuality, either of obligation or of remedy, is considered in the following cases; and I think it very clear, that the rule was applied with much more strictness and severity in the older than in the later decisions; indeed, the rule, so far as it relates to the mutuality of the remedy alone, is evidently based upon no principles of abstract right and justice, but, at most, upon notions of expediency; and the arguments in its support are often mere repetitions of time-honored verbal formulas, which, when closely analyzed, are found to have little or no real force and meaning. *Williston v. Williston*, 41 Barb. 635; *White v. Schuyler*, 1 Abb. Pr. 301; *Woodward v. Aspinwall*, 3 Sandf. 272; *Woodward v. Harris*, 2 Barb. 439; *Phillips v. Berger*, 8 Barb. 527; *German v. Machin*, 6 Paige, 288; *Matter of Jane Hunter*, 1 Edw. Ch. 1; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 263; 14 Johns. 15; *Clason v. Bailey*, 14 Johns. 484; *Hooker v. Pyncheon*, 8 Gray, 550; *Old Colony R. R. v. Evans*, 6 Gray, 25, 31; *Dooley v. Watson*, 1 Gray, 414; *Parker v. Perkins*, 8 Cush. 318; *Murphy v. Marland*, 8 Cush. 575; *Plunkett v. Methodist Epis. Soc.*, 3 Cush. 561; *Western R. R. v. Babcock*, 6 Met. 346, 353; *Ives v. Hazard*, 4 R. I. 25, 27; *City of Providence v. St. John's Lodge*, 2 R. I. 46, 59; *Rogers v. Saunders*, 16 Me. 92, 97, 101; *Getchell v. Jewett*, 4 Greenl. 350, 366; *Telfair v. Telfair*, 2 Dessaus. Ch. 271; *Tyson v. Watts*, 1 Md. Ch. 13; *Duval v. Myers*, 2 Md. Ch. 401; *Geiger v. Green*, 4 Gill, 472; *Cabeen v. Gordon*, 1 Hill Ch. 51; *Moore v. Fitz Randolph*, 6 Leigh, 175; *Boucher v. Van Buskirk*, 2 A. K. Marsh. 346; *Hawley v. Sheldon*, *Harring. Ch.* 420; *Bodine v. Glading*, 21 Pa. St. 50; *Bronson v. Cahill*, 4 McLean, 19;

enforced, and yet in respect to which there is no mutuality in this remedy, it might, perhaps, be correct to state the general doctrine in the following form: Whenever a contract is of such a form and nature that it contains mutual executory promises, or whenever it is intended that it should require future acts or omissions from each of the parties, and that each should be bound to such acts or omissions by express undertakings, then, in all such agreements, there must be both the mutuality of obligation and of remedy; but when it was intended that the contract should, in its express terms, be binding upon one of the parties alone, it *may* be specifically enforced against that party, although the remedy cannot be granted to him against the promisee.

SEC. 170. The second general exception to the requirement of mutuality includes all those agreements which, by the provisions of the statute of frauds, must be in writing, and which, in conformity with the overwhelming weight of judicial authority, need only to be signed by the party to be charged—that is, by the defendant in the suit brought upon the contract. It follows, therefore, that the plaintiff, who has not signed the memorandum, may enforce a specific performance, although no relief could be obtained against him in respect of the promises made therein on his part.(1) This doctrine is firmly settled, but the reasons given for it are not very convincing. Some cases have explained it by saying that the statute of frauds requires a signature by one party only.(2) This is undoubtedly true as a fact, but it wholly fails to account for the rule under consideration. It does not show why a mere compliance with a requirement of this statute should override a general principle of the law of contracts which is

*Watts v. Waddle*, 6 Peters, 392. Cases in which the remedy was refused for special reasons. *Buckmaster v. Thompson*, 36 N. Y. 558 (uncertainty); *Hawralty v. Warren*, 3 C. E. Green, 124 (refusal of vendor's wife to join); *Parry v. Tobacco Ins. Co.*, 1 Cinn. Supr. Ct. 251 (default of party holding the option); *Philips v. Mining, etc., Co.*, 7 Phila. 619.

(1) *Hatton v. Gray*, 2 Cas. in Ch. 164; *Backhouse v. Crosby*, 2 Eq. Cas. Abr. 32, pl. 44; *Morgan v. Holford*, 1 Sm. & Gif 101, and additional cases cited *ante*, § 75. In New York and some of the other states it is expressly provided, that in contracts for the sale of any interest in land, the memorandum need be signed only by the vendor, and in these states a suit can be maintained against the vendee, although he has not signed, provided the vendor has; while no suit can be maintained against the vendee who has signed, unless the vendor has also signed. In other words, the validity of the contract depends upon the vendor's subscription alone; that made, the obligation and remedy are mutual. See cases cited *ante*, § 75.

(2) See *Coleman v. Upcot*, 5 Vin. Abr. 527, pl. 17; *Child v. Comber*, 3 Sw. 423, n.; *Backhouse v. Mohun*, 3 Sw 434, n.; *Seton v. Slade*, 7 Ves. 265; *Lord Ormond v. Anderson*, 2 Ball & B 363.



completely outside of that enactment, since the statute of frauds has no necessary connection with the element of mutuality.(1) The reason commonly given, however, is that the plaintiff, who has not signed the memorandum, by commencing a suit upon it waives all objection to the absence of mutuality, makes himself liable on the contract, and thus, in fact, renders the remedy mutual.(2) This reason does not seem to be entirely satisfactory. As a practical result from the statute of frauds, the contract, which must be written and which is subscribed or signed by one party only, lacks the mutuality of obligation; and this is even literally true in all those states whose statutes pronounce such contracts void; and the objection arising from the absence of this essential feature, at the very time of entering into an agreement, cannot, as a general proposition, be waived by the subsequent consent or act of the party who is not bound. It is, on the whole, best to concede that the doctrine rests upon no basis of principle; that it was arbitrarily laid down by the earlier decisions which interpreted the statute, and has been followed by the great majority of subsequent cases; and that it is useless to account for, or explain it by reasons which conflict with other well-settled rules.(3)

SEC. 171. The third class contains all those contracts in which the party who, for some reason, is not originally bound by their stipulations, or against whom the equitable remedy cannot be obtained, may, by his subsequent acts, omissions, or assent, waive the objection arising from this want of mutuality, and may thereupon enforce them against the other party. The cases where such waiver has been permitted are quite unlike in their features; but after illustrating them by examples, it may be possible to extract a principle from the decisions to which they shall all conform. 1. Where a vendor has no estate in the land, or where his title is imperfect, the purchaser has, of course, a perfect defense to a suit for a specific performance on behalf of the

(1) See, on this subject, *Boys v. Ayerst*, 6 Mad. 323, per Sir JOHN LEACH, M. R.

(2) *Child v. Comber*, 3 Sw. 423, n.; *Seton v. Slade*, 7 Ves. 265; *Fowle v. Freeman*, 9 Ves. 351; *Western v. Russell*, 3 V. & B. 192, per Sir WM. GRANT; *Martin v. Mitchell*, 2 J. & W. 413; *Flight v. Bolland*, 4 Russ. 298. The contract must be signed by all the defendants against whom its enforcement is asked. *McIntire v. Bowden*, 61 Me. 153.

(3) The whole doctrine that a memorandum signed by the defendant—under that form of the statute which adopts or follows the terms of the English act—is sufficient, and may be enforced by a plaintiff who has not signed, has been severely criticised by able judges and courts, upon the ground that it overrides the general requisite of a mutuality in the obligation. See *Lawrence v. Butler*, 1 Sch. & Lef. 13, per Lord REDFORD; *Davis v. Shields*, 26 Wend. 362, per VERPLANCE, Senator, and cases cited *ante*, § 75

seller; he will not be forced to accept a conveyance of a title or interest other than that which he contracted to buy. But if the vendee in such a case investigates the title, takes the usual steps concerning it, and joins in proceedings by the vendor to perfect his title and to acquire the full estate, he will be compelled to accept a conveyance after the vendor has succeeded in completing his title, and obtaining the estate which was intended by their agreement; he cannot then prevent a decree by setting up the original lack of mutuality.<sup>(1)</sup> It should be carefully observed that the mutuality which is wanting in such contracts is not that of obligation, for the vendor is fully bound by his stipulation to sell and convey the very interest described, and the vendee is equally bound to accept it. The mutuality which is here absent is entirely that of the remedy, since it is physically impossible to obtain a specific performance by compelling the vendor to convey an estate which he does not at the time hold, although he is liable from the outset to the legal remedy of damages for a breach of his agreement.

SEC. 172. 2. The second case of waiver includes those contracts

(1) *Salisbury v. Hatcher*, 2 Y. & C. C. C. 54; *Hoggart v. Scott*, 1 R. & My. 293. This case is the exact converse of the one to be subsequently mentioned, in which the vendee enforces the contract against a vendor who cannot fully perform. In *Murrell v. Goodyear*, 1 DeG. F. & J. 432, it is held that if the purchaser is entitled at all to insist that the vendor's having only a partial interest makes the contract void, he must insist upon the objection at once, and cannot avail himself of it after having treated the contract as good, and required the concurrence of the persons who can complete the title. See the case for acts of the vendee which shut him off from objecting. To the same effect, see, also, *Westall v. Austin*, 5 Ired. Eq. 1; *Kindley v. Gray*, 6 Ired. Eq. 445. Same case holds that a vendor, who *bona fide* sells his property, believing himself absolute owner, when he has in fact only a partial interest, is entitled to enforce the contract if he can perfect his title. *Murrell v. Goodyear*, *supra*; *Dresel v. Jordan*, 104 Mass. 415, says: "The equitable rule is established by numerous authorities, that where time is not of the essence of the contract, and is not made material by an offer to fulfill by the purchaser, and a request for a conveyance, the seller will be allowed reasonable time and opportunity to perfect his title, however defective it may have been at the time of the agreement. And in all cases it is sufficient for the seller, upon a contract made in good faith, if he is able to make the stipulated title at the time when, by the terms of the agreement, or by the equities of the particular case, he is required to make the conveyance in order to entitle himself to the consideration." See *Richmond v. Gray*, 3 Allen, 25; *Barnard v. Lee*, 97 Mass. 92; *More v. Smedburgh*, 8 Paige, 600; *Purcell v. McCleary*, 10 Gratt. 246; *Reeves v. Dickey*, 10 Gratt. 18; *Jones v. Taylor*, 7 Tex. 240; *Tison v. Smith*, 8 Tex. 147. And where the vendor has the right to complete his title, the vendee gains nothing by anticipating him and perfecting it for himself. *Westall v. Austin*, 5 Ired. Eq. 1; *Kindley v. Gray*, 6 Ired. Eq. 445. See this subject discussed at large in subsequent sections upon performance by the plaintiff.

which, by reason of some special and personal relations between the parties, are binding upon one of them only. If the exemption is a personal one—that is, given by the law for the personal benefit of the party enjoying it—he may disregard it, by bringing a suit for a specific performance; he will waive both his personal exemption, and the absence of mutuality which it produces, and will be able to enforce the agreement against the other contracting party.<sup>(1)</sup> The reasons of this are plain. Although the mutuality here wanting is that of obligation, its absence results from something which is a merely personal privilege, given for the benefit of the individual party; a benefit which he can waive, and thus render himself liable without violating any motives of public policy or any general principles of the law. As he might thus waive the exemption from liability which exists in his own favor, he is permitted to enforce the agreement against the other contracting party, the suit itself being considered as a waiver. If the exemption from liability and consequent want of mutuality result from some personal incapacity of the party—such as infancy, marriage, and the like—they cannot be thus waived; at all events, while the incapacity continues.

SEC. 173. 3. The third species embraces cases of a partial performance by the vendor, with or without compensation for his failure to perform in full. When the vendor has not the whole estate which he agreed to sell, or when his title to it is partial and imperfect, he cannot, as has been already shown, force an acceptance upon the vendee, and the agreement lacks the mutuality of the equitable remedy. The purchaser may, however, waive this objection, and compel the vendor to convey all the estate or title which he actually possesses and is able to transfer, and often to make compensation for his failure to perform the agreement according to its literal terms. The principle on what the courts proceed in granting this form of relief, was stated

(1) A familiar example of this class is a contract of sale made between a trustee and his beneficiary, which is not binding upon the latter, but which he can, nevertheless, enforce against the trustee, the suit for a performance being regarded as a waiver and ratification. *Ex parte Lacey*, 6 Ves. 625. A contract of sale, made by a voluntary settler, is treated in like manner by the English courts. The voluntary settler cannot enforce against the vendee. *Smith v. Garland*, 2 Meriv. 123; *Johnson v. Legard*, T. & R. 281; but the vendee may compel a specific performance by the settler. *Buckle v. Mitchell*, 18 Ves. 100. A contract of sale between an infant and an adult cannot be enforced *against* the infant, nor *by* him, since the infant, during his minority, cannot render himself liable in any manner, and so cannot obviate the want of mutuality. But as the agreement is not void but only voidable, after the infant comes of age he can, of course, then ratify and render it capable of specific execution at the suit of either party.

in the following manner by Lord ELDON: "If a man having partial interests in an estate chooses to enter into a contract, representing it and agreeing to sell it as his own, it is not competent to him afterwards to say, though he has valuable interests, that he has not the entirety, and that therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion in his contract; and if the vendee chooses to take as much as he can have, he has a right to that and to an abatement; and the court will not hear the objection by the vendor, that the purchaser cannot have the whole." (1) This doctrine is one of great practical importance, and is constantly applied in the specific execution of contracts, and I shall have occasion to treat it at large in a subsequent chapter. (2)

SEC. 174. Although the doctrine of partial enforcement, with compensation, when the vendor cannot fully perform, is sustained by repeated adjudications, it has met with a severe criticism, and even repudiation from one eminent equity judge. Lord REDESDALE, in several decisions made by him when chancellor of Ireland, restrained the doctrine within very narrow limits, and refused to apply it in cases similar in their facts to several which are cited in the foregoing note. (3) These criticisms, and the decisions in which they were made,

(1) *Mortlock v. Buller*, 10 Ves 315, per Lord ELDON.

(2) See chapter iii, section iv, on Partial Performance and Compensation, where the subject is fully discussed in all its applications, and with all its exceptions and limitations.

(3) Although these decisions are plainly opposed to the general current of authority, yet, as they are frequently cited, especially in the arguments of counsel, it is proper to describe them. One of them (*Harnett v. Yielding*, 2 Sch. & Lef. 549, 553, 559), involved a contract by a life-tenant acting beyond his powers, which Lord REDESDALE refused to execute even partially. He said: "I think courts of equity should never enforce such contracts, whether with a view to the party himself or to the person entitled in remainder. In the first place, it is unconscionable in the tenant for life to execute such a lease, because it brings an incumbrance on the estate of the remainderman, and puts him to litigation to get rid of it; and as to the tenant for life himself, it is compelling him to do what is to be the foundation of a future action for damages, if he die before the twenty-one years. The court will never do this, but will leave the party at once to bring his action for damages. And I also conceive that this sort of contract, obtained by a person who knew at the time the nature of the title, is unconscionable in him, as he makes himself a party knowingly to that which is a fraud on the remainderman; and, under such circumstances, he has no claim to the assistance of a court of equity." In another case (*Lawrenson v. Butler*, 1 Sch. & Lef. 13, 21), a tenant for life agreed with the plaintiff to grant a lease, which he could not do without the consent of trustees, which was refused. The plaintiff brought a suit against the life-tenant, and claimed that he should have such a lease as the defendant was able to grant

are not only opposed to the doctrine of other cases, both prior and subsequent; their correctness has been expressly denied by modern equity judges of the highest ability and eminence, so that the authority of their general reasoning may be considered as completely destroyed.(1)

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## SECTION VIII.

*The contract must be fair, equal, and just in its terms.*

SECTION 175. The principle—he who seeks equity must do equity—underlying all the special rules which form the subject-matter of the second group of sections, has already been discussed, and its effect upon the equitable remedy of specific performance described; I need only, therefore, recapitulate the general doctrine, as a preliminary to an investigation of its various applications to different cases. When an agreement is tainted with fraud, mistake, misrepresentation, concealment, illegality, or other similar defect, which constitutes a defense in bar at law, or which furnishes grounds for a rescission in equity, there is, in reality, no binding contract, and in this respect both the legal and the equitable jurisdictions are governed by the same rules. The grand and beneficial principle, whose effects we are now to investigate, extends

out of his own estate. Lord REDESDALE refused to grant any relief, on the ground that there was no mutuality. “No man signs an agreement but under a supposition that the other party is bound as well as himself, and, therefore, if the other party is not bound, he signs it under a mistake;” and he insisted that the doctrine of partial enforcement only applied where the plaintiff on the faith of the agreement has put himself in a position from which he cannot extricate himself, and is, therefore, willing to forego a part of his contract—where in short he would sustain a substantial injury, unless he could obtain whatever partial execution the defendant is able to give. It is not, perhaps, so much the *decisions* made by Lord REDESDALE upon the special facts in these cases, which are questionable, although doubt has been thrown upon them; it is rather the general tendency and scope of his whole argument, which are in conflict with the doctrine as to a partial enforcement against the vendor which is now well established.

(1) See *Thomas v. Dering*, 1 Ke. 746, per Lord LANGDALE, M. R.; *Dyas v. Cruise*, 2 Jon. & Lat. 460, 487, per Lord St. LEONARDS, who, speaking of the decision in *Lawrenson v. Butler*, said: “I doubt whether that can be maintained as the law of the court where there is no fraud in the transaction. If there be a *bona fide* intention to execute the power, and the contract cannot be carried into effect, I do not see why the interest of the tenant for life should not be bound to the extent he is able to bind it, unless there be some inconvenience.” And see *Neale v. Mackenzie*, 1 Ke. 474.

far beyond these incidents which affect the validity and even existence of agreements ; it applies to contracts which are valid, and which confessedly create legal obligations ; it is developed in its practical operation so as to meet and counteract every possible circumstance and feature of unfairness, inequality, and inequity. The principle, that he who comes into the court seeking equity—that is, seeking to obtain an equitable remedy—must himself do equity, means not only that the complainant must stand in conscientious relations towards his adversary, and that the transaction from which his claim arises must be fair and just in its terms ; but, also, that the relief obtained must not be oppressive nor hard upon the defendant, and must be so shaped and modified as to recognize, protect, and enforce all *his* rights arising from the same subject-matter, as well as those belonging to the plaintiff. By virtue of this principle, the specific performance of a contract will be refused when the plaintiff has obtained the agreement by sharp and unscrupulous practices, by overreaching, by non-disclosure of important facts, by trickery, by taking undue advantage of his position, or by any other means which are unconscientious ; and when the contract itself is unfair, one-sided, unjust, unconscionable, or affected by any other such inequitable feature, or when the enforcement itself would be oppressive or hard upon the defendant, or would prevent the enjoyment by him of his own rights, or would in any other manner work injustice. The requisite of mutuality is obviously involved in certain phases of this principle. Unless the contract and the remedy were mutual, they would be one-sided, unfair, burdensome upon the defendant, without affording him an opportunity for any corresponding benefit.(1) I shall, in the present section, discuss the applications of this doctrine in respect to the terms of the contract, and

(1) See *ante*, chapter 1, section 2, and cases cited, § 85, (n). Also, *Willan v. Willan*, 16 Ves. 83, per Lord ELDON ; *Twining v. Morrice*, 2 Bro. C. C. 326 ; *Savage v. Brocksopp*, 18 Ves. 335 ; *Davis v. Symonds*, 1 Cox, 406 ; *Redshaw v. Bedford Level*, 1 Ed. 346 ; *Revel v. Hussey*, 2 Ball & B. 288 ; *Reese v. Reese*, 41 Md. 554 ; *Magraff v. Muir*, 57 N. Y. 155 ; *Crane v. DeCamp*, 6 C. E. Green, 414 ; *Walker v. Hill*, 6 C. E. Green, 191 ; *Merritt v. Brown*, 6 C. E. Green, 401 ; *Cuff v. Dorland*, 55 Barb. 481 ; *Bowman v. Cunningham*, 78 Ill. 48 ; *Taylor v. Merrill*, 55 Ill. 52 ; *Fitch v. Boyd*, 55 Ill. 307 ; *Jackson v. Ashton*, 11 Peters, 229 ; *McNeil v. Magee*, 5 Mason, 244 ; *Osgood v. Franklin*, 2 Johns. Ch. 23 ; *Minturn v. Seymour*, 4 ib. 497 ; *St. John v. Benedict*, 6 ib. 111 ; *Acker v. Phoenix*, 4 Paige, 305 ; *Clitherall v. Ogilvie*, 1 Dessaus. Ch. 257 ; *Howard v. Moore*, 4 Sneed, 317 ; *Barker v. May*, 3 J. J. Marsh. 436. It necessarily follows, from these equitable incidents and features of the contract, that a less strong case is sufficient to defeat an application for a specific performance than is requisite to obtain the remedy. See the remarks upon this point of Lord COTTENHAM in *Vigers v. Pike*, 8 Cl. & Fin, 592, 645.

the circumstances under which it is concluded; and shall, in the following section, treat of the same doctrine in direct connection with the remedy.

SEC. 176. The inequitable element of unfairness which shall defeat the remedy of specific performance may, as has been already indicated, inhere in the provisions of the agreement itself; or, it may have existed in the preliminary negotiations, relations of the parties, and other circumstances preceding or accompanying the conclusion of the contract, and parol evidence is admissible to establish the latter condition.(1) These two aspects of the subject will be separately treated in the order here stated.

SEC. 177. *First. The contract itself. I. The time when the unfairness, etc., must exist.*—The question to be answered is: To what time in the history and progress of a contract must the element of fairness be referred, so that if it then exists no objection can be raised to a specific performance based upon the principle under discussion? If the agreement possesses all the elements of fairness both in its terms and in its surrounding circumstances at the time when it is entered into, is this requisite forever satisfied, so that no inequality, one-sidedness, hardship arising from subsequent and at the outset unforeseen events, or change of relations and circumstances, shall avail to prevent a specific enforcement? Or, notwithstanding the original fairness and equality, may the equitable remedy still be refused because an unexpected alteration of circumstances or happening of untoward events has rendered the contract unfair, burdensome, or unequal, and its execution by the court harsh and inequitable? There is on this point a direct conflict among the authorities. According to one opinion, the first of these questions should be affirmatively answered; according to the other, the second. Certain cases hold the doctrine that if a contract is fair and unobjectionable at its inception, no change of circumstances or relations or events however unexpected, and however much inequality and hardship they may produce in the operation of the agreement, shall constitute a sufficient ground for denying the remedy of specific performance.(2) Other decisions declare that this rule, although, perhaps, correct in the main, is subject to exception,

(1) *Davis v. Symonds*, 1 Cox, 402.

(2) Mr. Fry lays down this proposition without limitation or exception, both with respect to the fairness of the contract and the hardship of its execution. See *Fry on Spec. Perfm.*, §§ 235, 252; *Pickering v. Pickering*, 2 Beav. 56; *Frank v. Frank*, 1 Cas. in Ch. 84; *Lawton v. Campion*, 18 Beav. 87; hardship, *Lawder v. Blachford*, Beat. 522; *Webb v. Direct London & Portsmouth Ry. Co.*, 9 Ha. 129; *Low v. Treadwell*, 3 Fairf. 441; *Marble Co. v. Ripley*, 10 Wall. 389.

and that subsequent events and changing circumstances may so effect the equity of a contract as to prevent its judicial enforcement.(1)

(1) Judge STORY maintains this opinion. Eq. Jur., §§ 750, 776; Willard v. Tayloe, 8 Wall. 557; and see Stone v. Pratt, 25 Ill. 25; Hale v. Wilkinson, 21 Gratt. 75. There is a very curious disagreement in two recent decisions by the United States supreme court. In Willard v. Tayloe, *supra*, the question was directly presented, and made the very *ratio decidendi*. A contract for the leasing of a hotel, in Washington, with power to the lessee of buying it after ten years, at a specified price. It was conceded that the contract was perfectly fair in every respect, the price ample, etc. Before the time for buying the war began, the property rose vastly in value, much more than was expected, and at same time legal-tender notes were greatly depreciated. The vendor refusing to convey for the price tendered in legal-tender notes, the vendee brought suit for a specific performance. Held, that although the contract was perfectly fair in its inception, yet as its enforcement had become inequitable by subsequent and unexpected events, which could not have been contemplated by the parties, the court would not enforce it without imposing conditions on the plaintiff. A specific performance was, therefore, refused unless the plaintiff would pay the price in gold. In support of the position that subsequent events might thus effect the remedy, the court cited City of London v. Nash, 1 Ves. Sen. 12; Faine v. Brown, cited in Ramsden v. Hylton, 2 Ves. Sen. 306. (See the extract from the opinion *ante*, in § 35.) The court, except two judges, united in this opinion, so that it was a decision directly necessary to sustain the judgment which the court pronounced. Shortly after the case of Marble Co. v. Ripley, 10 Wall. 339, came before the same court. A contract was sought to be enforced, and it was objected that, though fair in the inception, a change of circumstances had made it very one-sided and unfair as against the party opposing the relief. The opinion was given by STRONG, J. (the former one by FIELD, J.), and after stating the claim and the defense, he says, page 356: "It is by no means clear that a court of equity will refuse to decree the specific performance of a contract, fair when it was made, but which had become a hard one by the force of subsequent circumstances or changing events." (Citing Fry, *ubi. sup.*) "Judge STORY, indeed, states the rule somewhat differently (§§ 750, 776), and there are some cases that support his statement; but the rule, as stated by Fry, must be applicable to contracts that do not look to a completed performance within a defined and reasonable time, but contemplate a continuous performance extending through an indefinite number of years or perpetually." The case, however, was decided on entirely other grounds; the relief was refused for different reasons, so that these observations were entirely *obiter*. Although there is no conflict between the conclusion to which Judge STRONG finally comes—the class of contracts to which he limits the rule—and the prior decision in Willard v. Tayloe, yet it is very remarkable that not the slightest reference is made to a case, decided by the same court so short a time before, in which the general doctrine was expressly laid down contrary to the position maintained by Mr. Fry. In Stone v. Pratt, 25 Ill. 25, the specific performance of a contract of sale was refused, because on account of circumstances and transactions happening after its execution, which, however, had been all done or caused by the plaintiff's conduct, the enforcement would work great hardship to the defendant. The opinion does not advert to the question now under discussion, and the fact that the hardship was caused by the plaintiff's inequitable acts distinguishes the case, and prevents it from being an illustration of or an authority upon the general rule. (See case and opinion, *ante*, § 35.)



SEC. 178. The general proposition that if contracts are fair, equal and equitable in their inception, no unfairness, inequality or hardship arising from subsequent events however unforeseen, or change in circumstances however unexpected, can avail to prevent a specific performance, must, as appears clear from a comparison of the authorities, be modified by adding certain limitations and exceptions. It is clear that if the subsequent events and changed circumstances which produce the unfairness or hardship in the contract, or in its enforcement, as against the defendant, are caused by the plaintiff's own wrongful or inequitable acts or omissions, a sufficient ground is thereby furnished for refusing to decree a specific execution.(1) The general rule above stated, that the element of fairness must be referred to the inception of the agreement, is certainly applicable to all contracts that by their provisions do not look to a completed performance within a defined or reasonable time, but contemplate a continuous performance extending through an indefinite number of years, or perpetually. For in such agreements the parties must be assumed to have provided against all possible contingencies.(2) This rule is also applicable to all compromises, and especially to those made for the purpose of arranging and settling family disputes, controversies, and claims. Such agreements always assume some existing uncertainty, which it is their object to determine, and this uncertainty may consist either in some future and therefore necessarily contingent event, or in the present ignorance as to some event which has happened, but the nature of which is to be ascertained in the future.(3) When such agreements are fairly and deliberately made by parties who have equal knowledge and means of obtaining knowledge of the material facts, and who intend thereby to fairly and finally settle their respective rights and claims, they will be sustained and enforced, although the subsequent development of the uncertain facts and events should be different from what the parties had anticipated.(4)

(1) See *Stone v. Pratt*, 25 Ill. 25. (*Ante*, § 35.)

(2) See per *STRONG, J.*, in *Marble Co. v. Ripley*, 10 Wall. 339, 356.

(3) As illustrations of the latter kind, is the disputed question whether a certain son is legitimate or not, which might form the subject of a family compromise (*Stapilton v. Stapilton*, 1 Atk. 2); and the question whether an uncle had made a particular disposition of his property by will, which also may be the basis of compromise. *Heap v. Tonge*, 9 Ha. 90.

(4) This doctrine was well expressed by Lord LANGDALE, in *Pickering v. Pickering*, 2 Beav. 31, 56, as follows: "When parties whose rights are questionable have equal knowledge of facts, and equal means of ascertaining what their rights really are, and they fairly endeavor to settle their respective rights among them-

The same rule, also, applies to all agreements which are in reality settlements of uncertainties or contingencies, when made fairly by parties having equal opportunity of knowing and judging.<sup>(1)</sup> But it is an indispensable condition, in such contracts, that the event or act on which the agreement is predicated, be at the time of its conclusion *really* uncertain and equally unknown to both the parties. If, therefore, a contract purporting to be of this aleatory nature, is made between one who has knowledge of the event, act, or fact assumed in the negotiation to be uncertain, and one who has not—although its provisions may be so drawn as to expressly throw the risk upon the ignorant party—it will not be enforced by a court of equity at the suit of the one who possessed the knowledge, and would acquire an advan-

selfes, every court must feel disposed to support the conclusions or agreements to which they may fairly come at the time, and that notwithstanding the subsequent discovery of some common error." Such an agreement will be held binding and enforced, although a judicial decision should afterwards be made, showing that the rights of the parties were different from what they had been supposed to be, or showing that one of them really had no right at all, and so nothing to forego. *Lawton v. Campion*, 18 Beav. 87; *Frank v. Frank*, 1 Cas. in Ch. 84.

(1) The following are some examples. In *Parker v. Palmer*, 1 Cas. in Ch. 42, Parker, while the king was overthrown, had sold a lease, which he held for three lives from a dean and chapter, to Palmer, the price being £4320. Subsequently, Palmer agreed that if the vendor would abate 420*l*, he would reconvey the lease whenever the king and the dean and chapter should be restored. The abatement was made, and after the restoration, which happened soon after, the vendee was compelled to reconvey. Here the vendee made his bargain with his eyes open, assuming all the risk of the contingency, and, of course, having great confidence that the restoration never would happen. This mistake in his judgment was no reason for discharging him from his agreement. In *Anon*, cited in *Cooth v. Jackson*, 6 Ves. 24, a person was expecting an allotment to be made under an inclosure act, and he agreed to sell it for £20. When made, it turned out to be worth 200*l*, and he was compelled to perform. Here the value of the future allotment was wholly uncertain—the parties acted with equal knowledge—it was an aleatory agreement. If there had been any fraud—if the vendee had known the value of the expected allotment and concealed it—of course the decision would have been different. Again, in *Ex parte Peak*, 1 Mad. 346, 355, a contract between two partners, made without fraud or concealment, whereby one agreed to pay the other 2,000*l* for his share, although both knew the firm was insolvent, was enforced. Sir JOHN LEACH, putting it on the ground that the purchaser was fairly and deliberately buying a chance: "Supposing a trade attended with great risk, one partner despairing, the other confident and willing to buy the share of his partner and give him £2,000 for it, on what possible ground could this contract be invalidated?" See *Haywood v. Cope*, 4 Jur. (N. S.) 227. Under the same class are those contracts in which a vendor agrees to sell something which is described in general terms, the extent and value of it being uncertain, as a manor. *Baxendale v. Seale*, 19 Beav. 601; and those in which the vendor sells whatever interest he has, which may afterwards be found different from what was expected at the time.

tage by means of it.(1) It is also necessary that the uncertainty in respect of which the contract is made, should be understood and intended by both parties as attaching to the very same event or act which, being then unknown but anticipated, afterwards happens. If, therefore, the parties contract with reference to a certain contingent or doubtful event, and some other unknown fact, to which the parties had not referred, and in respect of which they had not contracted subsequently arises, materially altering their relations, and rendering an execution of their agreement inequitable, its enforcement may, under such circumstances, be denied.(2) To recapitulate, subsequent events or change of circumstances will not interfere with the enforcement of a contract fair in its inception ; 1, if it was intended by its terms to continue in force for an indefinite time or perpetually ; 2, if it was based upon and intended to settle some uncertainty, including compromises, family arrangements, sales of uncertain or

(1) *Smith v. Harrison*, 26 L. J. Ch. 412, per PAGE WOOD, V. C., is a very instructive illustration of this rule. A written contract purported to sell "the interest, if any," of F. N. in certain stock in trade and in a lease ; it stated that there was a lien of 100*l* on the lease, and added, that if it should turn out that F. N. had no interest, the purchaser should have no claim against the vendor for a refunding of the purchase-price. As a matter of fact, by reason of the partnership accounts of the firm of which F. N. was a member, the interest of F. N. sold was nothing—had no value whatever, and the sale was made solely as a preliminary to proceedings against F. N.'s separate estate. This condition of the accounts was known at the time of the contract to the vendor, but the vendee had no knowledge of it, and no means of obtaining any. The vendor made no representations as to the value, but the vendee paid him the purchase-price. This contract was set aside, with costs, at the suit of the purchaser, because the parties did not stand on the same footing ; the purchaser, from ignorance, was buying what might perhaps be worth nothing or something ; the vendor was selling what was actually worth nothing, and what he knew to be worth nothing.

(2) As in *Baxendale v. Seale*, 19 Beav. 601. The vendor contracted to sell a manor, stipulating that he should not be obliged to define its boundary. [Here, therefore, the parties understood that the uncertainty, with respect to which they contracted, was confined to the matter of boundary.] The manor turned out to comprise a valuable property, which neither party before knew to be a part of it. The vendee, who had sought to get rid of the contract, then sued for a specific performance. Sir JOHN ROMILLY, M. R., held that the parties did not contemplate the buying and selling a mere doubtful matter (the uncertainty as to the boundary being only an incidental matter), and that both parties made the contract understanding that it included something materially different from what it would be made to include, and what would be conveyed to the plaintiff, by a specific performance as demanded by the plaintiff. In other words, neither party understood that the contract embraced this valuable property, which was utterly unknown when the contract was made, and which could not be covered by the uncertainty in respect to the boundary. A performance was, therefore, denied, but without costs, which showed that the plaintiff was not in fault in suing.

contingent interests, or of unknown amounts, and the like. But in the latter class, the subsequent happening of an unknown event, or matter not included in the uncertainty referred to by the parties, may be a cause for refusing to grant the relief of specific performance. With respect to other kinds of agreements, although fair and just when made, it would seem from many decisions, both ancient and modern, that their enforcement may be interfered with and prevented by subsequent unforeseen events, which introduce a sufficient element of inequality, unfairness, or hardship.(1) It must be said, however, that this proposition is not universally admitted.

SEC. 179. *II. Incidents which aid in determining the fairness of the contract itself.*—Returning to the main subject of discussion—the fairness of the contract in its very provisions and stipulations. This is, of course, to be finally determined by an examination of the terms themselves; but in construing and interpreting the agreement and judging of its nature and effect, the court may be incidentally aided by a knowledge of all the circumstances attending its inception. It should be carefully noticed that this use of the surrounding circumstances, is entirely different from that to be subsequently considered, where the circumstances themselves constitute the substantial features of unfairness which prevent the granting of equitable relief. These facts, although not of themselves sufficient to impeach the contract, and even though wholly free from wrong or blame, may furnish a clue for the right understanding of the agreement, a light in which its provisions must be read. Among these attending facts, which ordinarily aid the court in testing the fairness of the contract, and which may, therefore, be shown by extrinsic evidence, are the mental feebleness of a party, although not amounting to a legal incapacity; (2) the age, poverty or ignorance of the parties; (3) the manner of entering into the contract; the want of advice; the inadequacy of the price, and many other analogous circumstances.(4) The following are some of the most common incidents which necessarily cast a doubt upon the fairness of a contract, which lead a court to examine its terms with the utmost care, and to refuse a specific performance unless all doubt is removed by the clearest demonstration of its fairness. Where the defendant against whom the remedy is sought, was, at the time

(1) See *Willard v. Tayloe*, 8 Wall. 557.

(2) *Clarkson v. Hanway*, 2 P. Wins. 203; *Gartside v. Isherwood*, 1 Bro. C. C. 558.

(3) *Fish v. Leser*, 69 Ill. 394.

(4) *Fish v. Leser*, 69 Ill. 394; *Bell v. Howard*, 9 Mod. 302; *Martin v. Mitchell*, 2 J. & W. 413, 423; *Stanley v. Robinson*, 1 R. & My. 527.

of making the contract, within the power of the plaintiff, so that an independent action and free exercise of judgment on his part would be virtually impossible or even difficult,(1) or where it appears that the defendant was, at that time, in a condition of great pecuniary distress or trouble, so that he would be likely to make an undue sacrifice.(2) Where such defendant was illiterate, or ignorant of the facts involved in the contract, or being so acted without advice, or was subjected to undue solicitation and pressure by the other party, and yielded thereto without full knowledge and without consultation; or where there was circumstances of haste, surprise and an undue advantage obtained, or any other fact showing the want of an intelligent, free, and full consent.(3) Courts of equity have not, however, in England, much less in this country, adopted a rule that a contract cannot be made without the aid of professional advice; (4) nor that a man, when in an insolvent condition, or when confined in prison, is necessarily unable to enter into a valid agreement for the sale of his property. Contracts made without professional advice, or by insolvents or prisoners, are most carefully scrutinized; but if they pass the judicial ordeal without disclosing any unfairness or other equitable defect, their specific execution is decreed.(5)

SEC. 180. *III. What contracts are unfair in their terms.*—What provisions of a contract are so unfair, one-sided, unequal, harsh, inequitable that a specific performance of them will be refused, must, of course, depend upon the circumstances of each individual case, so that it is impracticable to lay down any general rules which shall serve either as a test for decision, or a guide for the classification of cases. There are, however, certain species of agreements which are, in their

(1) *Blackwilder v. Loveless*, 21 Ala. 371.

(2) *Johnson v. Nott*, 1 Vern. 271; *Kemeys v. Hansard*, Coop. 125.

(3) *Fish v. Leser*, 69 Ill. 394; *Gasque v. Small*, 2 Strobb. Eq. 72; *Stanley v. Robinson*, 1 R. & My. 527; *Helsham v. Langley*, 1 Y. & C. C. C. 175; *Gasque v. Small*, *supra*, well illustrates several of these particulars. A young man, just twenty-one, agreed to purchase land for a price more than its worth, after an examination wholly insufficient to ascertain its value. From his lack of experience, knowledge, sagacity and advice, he was very unfit to carry on a negotiation with the vendor, who greatly exaggerated the advantages of the purchase, without, however, being guilty of any actually false representations or fraudulent concealments. Although there was no incapacity on his part, and no fraud on the part of the vendor, a specific performance was refused.

(4) In the forcible language of some of the cases, "without a solicitor at the parties' elbow." *Lightfoot v. Heron*, 3 Y. & C. Ex. 586; *Haberdashers' Co. v. Isaac*, 3 Jur. (N. S.) 611.

(5) *Brinkley v. Hann, Drury*, 175.

nature, essentially, unfair, and unfit to be enforced. These will be described, and some examples will be added of other contracts which admit of no general classification. 1. *Breaches of trust, etc.* Contracts whose provisions, if carried into operation, would constitute or require a breach of trust by the party performing, or would compel him to do an illegal or an unlawful act, will never be specifically enforced by a court of equity.(1) The reason of such refusal is found in the plainest principles of equity, since the agreement itself is essentially unfair, and it would be oppressive on the defendant to force the performance of an act which would inevitably subject him to some penal consequences, either to an action for damages, or perhaps even to a criminal prosecution. Examples of this rule may be found in the foot note.(2) If the agreement does not involve any

(1) *Harnett v. Yeilding*, 2 Sch. & Lef. 553, per Lord REDESDALE: "The plaintiff must also show that, in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do; for if he does, a consequence is produced that quite passes by the object of the court in exercising the jurisdiction, which is to do more complete justice."

(2) If trustees acting under a power agree to sell, but in so disadvantageous a manner for the interest of their *cestuis que trustent* that it amounts to a breach of trust, specific performance of the agreement is refused. *Mortlock v. Buller* 10 Ves. 292; *Bridger v. Rice*, 1 J. & W. 74; *Wood v. Richardson*, 4 Beav. 174; *Maw v. Topham*, 19 Beav. 576; *Hill v. Buckley*, 17 Ves. 394; *Neale v. Mackenzie*, 1 Ke. 474. Assignees for the benefit of creditors sold an estate at auction in a manner very improvident, showing a want of ordinary business judgment, and prejudicial to the assignor, for the sake merely of obtaining money at once with which to pay creditors, and a specific execution of the agreement was refused. *Ord v. Noel*, 5 Mad. 438. A trustee agreed to sell trust property, and stipulated that the purchaser might retain out of the price a private debt due him by the trustee; a specific performance at the suit of the trustee was refused. *Thompson v. Blackstone*, 6 Beav. 470. Trustees agreed to give a lease which was beyond their power, and the court refused to enforce. *Harnett v. Yielking*, 2 Sch. & Lef. 549; *Byrne v. Acton*, 1 Bro. P. C. 186. Trustees made a covenant for the renewal of a lease, which exceeded their authority, with the same result. *Bellringer v. Blagrove*, 1 DeG. & Sm. 63. Where trustees having power to sell made a contract of sale, but misrepresented the value of the property, although they had the means in their power of stating it correctly, and the contract stipulated for compensation on either side, in case of any failure, etc., the House of Lords reversed a decree which had awarded compensation against them for this their misrepresentation, and held that a court of equity would not enforce a provision which would injure the *cestuis que trustent*, by reason of the negligence of the trustees in making the misdescription. *White v. Cuddon*, 8 Cl. & Fin. 766, overruling *Cuddon v. Cartwright*, 4 Y. & C. Ex. 25. Specific performance of a contract for the sale of leaseholds made by one of two executors was refused, on the ground that under the circumstances it would be an injury to the *cestuis que trustent*, and expose the executor to extraordinary risk from them, and that either of these reasons was sufficient to prevent an enforcement. *Sneesby v. Thorne*, 1 Jur. N.

actual breach of trust, still a court of equity is always reluctant to enforce an agreement against trustees which may injuriously affect their interests or those of their beneficiaries. A contract of sale, therefore, made by trustees in an unbusiness-like manner, or contrary to the methods of an ordinarily prudent business man, will not ordinarily be enforced, unless it is clearly established that the price was fully adequate.(1) The general doctrine in regard to contracts requiring a breach of trust or an unlawful act, applies not only to technical trustees, but to all persons occupying a definite fiduciary relation or position of confidence towards others, and therefore extends to such agreements made by agents,(2) directors of corporations,(3) assignees in bankruptcy,(4) and the like.

SEC. 181. 2. *Injuring third persons.*—A second species of contracts which will not be enforced on account of this inherent inequity, are

S. 536. *Per* PAGE WOOD, V. C., affirmed on appeal, 7 DeG. M. & G. 399; *Magrane v. Archibald*, 1 Dow. 107. *Per contra*, in *Barret v. Ring*, 2 Sm. & Gif. 43, the trustees of a road had made a contract for sale in forgetfulness of a certain statutory right of pre-emption, which therefore made them liable to an action for damages if it should be brought against them—they were compelled by STUART, V. C., to complete it. *Helling v. Lumley*, 3 DeG. & J. 493, decided on the very special circumstances of the case, does not conflict with the rule stated in the text, which was fully approved in the opinion. The defendant was a lessee of a theatre, and one condition in his lease forbade him to let more than 150 boxes for over a year. At the time when all these boxes were open to him to let, he made a contract with plaintiff, whereby he covenanted to lease him a specified box (say box A.) for a term of years. He afterwards contracted and let out 150 other boxes, the full number he was allowed by his lease. Refusing to complete with plaintiff, the latter sued to compel a specific performance. Defendant set up in defense that if he should lease the box A. to plaintiff, he would violate his condition and forfeit his lease. *Held*, that, under the special circumstances, the defense could not be admitted. He had it in his power to comply with plaintiff's agreement when it was made. Nothing in the agreement exposed him to any penalty. He might have let box A. and counted it one of the 150. But, with full knowledge of all this, he chose to let out all the 150 to other parties, and thus, by his own act, brought himself in the predicament. Specific performance was decreed.

(1) *Goodwin v. Fielding*, 4 DeG. M. & G. 90; *Wormley v. Wormley*, 8 Wheat. 421.

(2) If a contract was the result of a breach of trust by an agent towards his principal, it would not be enforced. *Mortlock v. Buller*, 10 Ves. 292, 313.

(3) As, for example, directors of railways being trustees for the stockholders, a contract made by them which would operate as a breach of trust towards some or all of the stockholders, will not be enforced at the suit of a plaintiff having knowledge of the facts. *Shrewsbury & Birmingham Ry. Co. v. London & North Western Ry. Co.*, 4 DeG. M. & G. 115; 6 H. L. Cas. 113. See, on the general doctrine, *Law v. Urlwin*, 16 Sim. 377; *Rede v. Oakes*, 13 W. R. 303; *Ingle v. Richards*, 28 Beav. 361, 365.

(4) *Turner v. Harvey*, Jac. 169.

those whose provisions, when carried into operation, would defeat or materially injure the rights of third persons who have vested interests in the property as successive owners, remaindermen, reversioners, and the like.(1) Practically, this species of agreements is confined to England and Ireland as an incident of their system of family settlements, and could hardly be possible under our more simple and natural rules of real estate law and practices of land owners.

SEC. 182. 3. *Miscellaneous cases.*—The owner of certain lots in Chicago, a weak-minded man, ignorant of their value and of business, and unable to speak or understand English well, was induced, by the importunities of a land agent, during the excitement just following the fire, to agree to sell them for \$21,000. Their value at the time was at least \$30,000, and was rapidly increasing. Persons of large property had just made arrangements to build on adjoining lots, which would have greatly increased the value of these lots. All these facts were well known to business men generally, but not to the vendor, and were not told to him. The person who importuned him to sell, and who was made his agent to effect the sale, appeared to be acting also for the purchasers, and this fact was also concealed. A specific performance prayed by the vendee was refused.(2) This case presents every element of unfairness. The terms of the contract were unequal; the surrounding circumstances were of themselves a reason to defeat any relief, and many of these circumstances throw great light upon the provisions of the agreement. In a recent English case the defendant, an elderly lady, being ignorant of their real worth, agreed to sell two very valuable jars—articles of *virtu*—to the plaintiff, who was an expert and knew their nature and value. Although there was no actual fraud, yet, as the parties did not contract upon an equal footing, and the price was insufficient, a specific execution was refused.(3)

(1) *Thomas v. Dering*, 1 Ke. 729. The rights of persons not parties to the contract, and even when vesting after it was made, are proper equitable considerations to be taken into account in determining whether the contract should be specifically enforced. *Curran v. Holyoke Water Co.*, 116 Mass. 90. Where an owner has made a voluntary settlement of his estate, and afterwards enters into a contract for a sale of the land, he will not be permitted to enforce performance, and thus cut off the rights of the persons claiming under it. *Johnson v. Legard*, T. & R. 281; *Smith v. Garland*, 2 Meriv. 123.

(2) *Fish v. Leser*, 69 Ill. 394, 395. In the absence, however, of fraud, or other features of actual wrong dealing, the mere fact that the plaintiff has made an advantageous bargain in the transaction, will not prevent his enforcement of the contract. *Union Coal Mining Co. v. McAdam*, 38 Iowa, 663.

(3) *Falcke v. Gray*, 4 Drew. 651.



SEC. 183. *Second. Extrinsic circumstances rendering the contract unfair.*—Although the very terms of an agreement, taken by themselves, may be unobjectionable, the circumstances immediately preceding or accompanying, or succeeding its conclusion, the relations of the parties, the acts or omissions of the plaintiff during the negotiation, or even after the time of its being entered into, may be such as to stamp a character of inequity upon the agreement and to furnish an ample reason for withholding the equitable remedy. It may be laid down as a general proposition, that if there is any circumstance or fact connected with the preliminary negotiation or subsequent operation, with the relations of the parties, or conduct of the plaintiff, which renders its enforcement unfair, harsh, or inequitable upon the defendant, such specific performance will be refused; and to produce such a result, there need have been no intentional dishonesty or unfairness, although, in the great majority of instances, the design to overreach or obtain an undue advantage will of course be present.(1)

(1) *Mortlock v. Buller*, 10 Ves. 292, 305; *Twining v. Morrice*, 2 Bro. C. C. 326. A suit for a specific performance by a vendee against the vendor. The sale was at auction, and a solicitor, who was the well-known agent of the owner, made some biddings for the vendee, the plaintiff, at his request. As the attorney was known to be, in general, acting for the vendor, these biddings were supposed, by the by-standers, to be in fact those of a puffer employed by the vendor, and they restrained other persons from bidding. The attorney really acted without any design and thoughtlessly, so there was no intentional fraud; but as he acted by the direction of the plaintiff, and the natural effect of puffers' biddings was produced, a specific performance was refused by Lord KENYON, M. R. In *Marble Co. v. Ripley*, 10 Wall. 339, 357, the plaintiff, asking a specific performance, had taken very unfair advantage of a provision in the contract, which gave him a right of entry upon the happening of a certain contingency. By underhanded means and deception, he had procured a technical breach of the condition, imposing on defendant, and in fact inducing him not to take steps to prevent the breach, and then had secretly entered, etc. The court held that there was no real breach; that what took place was by the plaintiff's procurement, and then added: "The conduct of the complainant has not been such as to justify the court in decreeing a specific performance at his suit. Without relying upon his alleged unfounded claims set up from time to time, his unlawful and unwarranted entry and ouster of the marble company, was such an invasion of the contract as leaves him no standing as a plaintiff asking for its specific performance in a court of equity." In *Blackwilder v. Loveless*, 21 Ala. 371, defendant being in possession of land under claim of title, plaintiff obtained a recovery against him in proceedings for a forcible entry and detainer, which do not, however, decide any question of title. While he held a warrant for removal, defendant, who had growing crops on the land, made a written agreement whereby for \$30 he promised to convey the title, by a deed, and give up possession at the end of a year. The land was worth several hundred dollars. The court refused a specific performance because, although there was no fraud, mistake or technical duress, the parties did not deal on equal terms; the plaintiff occupied a position of unfair advantage

SEC. 184. The following are some of the particular facts and circumstances most frequently occurring, which, under the operations of this general doctrine, always impart an inequitable taint to agreements, and prevent a specific enforcement. The concealment, suppression, or neglect to disclose any fact during the negotiation, or at the time of the conclusion, which, if known, could have reasonably affected the result, although not amounting to such fraudulent concealment as would furnish the ground for a rescission, will induce the court to withhold its equitable remedy.<sup>(1)</sup> Quite analogous to this case, and indeed a particular instance of it, is that in which one party to the contract

whereby he secured the contract for an inadequate price, and the defendant was not in a situation to insist upon fair and equal terms. *Stone v. Pratt*, 25 Ill. 25, 34, is an instructive case. The owner of land agreed to sell it for \$4,000, and a part of the purchaser's interest was assigned to the plaintiff. The original contract of sale contained some provision by which the vendor's interest was made liable to a forfeiture. By some neglect on his part, the vendor's interest was forfeited, and sold by virtue of certain judicial proceedings to the plaintiff for a very small sum, none of which was received by the vendor. The plaintiff afterwards, as assignee of the vendee, sues for a specific performance, which was refused on the ground that defendant had received no compensation whatever for his land, and the decree would be very unjust and harsh. From the peculiar terms of the contract and the subsequent proceedings, the plaintiff had obtained an unconscionable advantage, and was seeking to perfect title to a valuable tract of land for which he had paid but little, and for which the owner had been paid absolutely nothing. A court of equity would not aid him in his design of making title, but would leave him to his strict legal rights and remedies. See the very able opinion, *ante*, § 35, note. For cases in which a specific performance was refused because the contract was too hastily and inconsiderately made, see *Godwin v. Collins*, 4 Houst. 28, and *Morganthau v. White*, 1 Sweeney, 395.

(1) *Fish v. Leser*, 69 Ill. 394, which includes several different items of concealment, viz., facts greatly enhancing the value of the property, and the fact that the agent of the vendor was secretly acting for the vendee. (See facts and opinion *ante*, §§ 35, 182.) In the following instances the concealment was held a ground for refusing the remedy. In making a contract for the sale of an estate, the fact that a wall, in order to protect it from the river Thames, required repairing. *Shirley v. Stratton*, 1 Bro. C. C. 440. An ignorant owner agreed to sell his land for a half-penny per square yard, which would amount to about 500*l*, while the property was worth £2,000, and this fact, known by the vendee, was carefully suppressed; this was really a case of fraudulent concealment. *Dean v. Rastron*, 1 Anst. 64. Where a lessee holding a lease *per autre vie*, and knowing that the person on whose life it depended was at the point of death, and suppressing the fact which was unknown to the lessor, procured a contract for the surrender of the lease and the renewal of it for another term. *Ellard v. Lord Llandaff*, 1 Ball & Be. 241; *Edwards v. McLeay*, Coop 308; 2 Sw. 287. Where the same attorney acted for both vendor and vendee, but did not disclose to both parties all the facts in reference to his position, and thus make them fully acquainted with their relations to each other through him, a suit for specific performance by the vendee was dismissed. *Hesse v. Briant*, 6 DeG. M. & G. 623.

has, at the time of its conclusion, full knowledge of any material facts which are involved in the agreement, while the other party is both ignorant of them and has no means of acquiring the information. Under such circumstances, the parties evidently do not stand on an equality; one has an undue advantage over the other; one is dealing concerning a certainty, the other concerning an uncertainty; and if the result is prejudicial to the interests of the ignorant party, a performance of the contract could not be enforced against him.(1) Another extrinsic circumstance which renders an agreement unfair and unfit to be specifically enforced, is the intoxication at the time when it was made of the party against whom the remedy is asked, even though such intoxication was not accompanied by acts which would be deemed fraudulent, and which would be a sufficient ground for decreeing a rescission.(2) The intoxication must be so complete as to suspend the operation of the party's mental faculties, and render him incapable of understanding the nature of the transaction. A condition of mere exhilaration or excitement produced by drink, is not sufficient if the party still comprehends what he is doing.(3)

(1) *Falck v. Gray*, 4 Drew. 651, and *Fish v. Leser*, 69 Ill. 394, cases of knowledge and ignorance respecting the value of the property sold. *Smith v. Harrison*, 25 L. J. Ch. 412.

(2) *Cooke v. Clayworth*, 18 Ves. 12; *Cragg v. Holme*, cited in 18 Ves. 14; *Nagle v. Baylor*, 3 Dr. & W. 60. A contract obtained from an intoxicated person by fraud will be rescinded. *Butler v. Mulvihill*, 1 Bli. 137. If a party was simply intoxicated, and there were no other circumstances of fraud, imposition, undue advantage, and the like, courts of equity incline to leave the parties without any help to their legal remedies; while it does not enforce such an agreement against the intoxicated person, it does not aid him by rescinding his contract on the ground of mere intoxication. *Story's Eq. Jur.* §§ 231, 232; *Campbell v. Ketcham*, 1 Bibb, 406; *Taylor v. Patrick*, 1 Bibb, 168; *White v. Cox*, 3 Hayw. 82; *Wigglesworth v. Steers*, 1 Hen. & Munf. 70.

(3) *Lightfoot v. Heron*, 3 Y. & C. Ex. 588; see *Shaw v. Thackray*, 1 Sm. & G. 537. Although intoxication might prevent the enforcement of the contract between the immediate parties, a specific performance might be decreed in favor of the first vendee against a second purchaser who bought with notice of the prior agreement. *Shaw v. Thackray*, 1 Sm. & Gif. 537. If the plaintiff, by his contrivance, led on the defendant to drink so as to affect his judgment, and then took advantage of this condition to obtain a contract favorable to himself, a specific performance would certainly be refused, and the agreement might even be rescinded at the suit of the injured party. *Cook v. Clayworth*, 18 Ves. 12; *Say v. Barwick*, 1 V. & B. 195; *Nagle v. Baylor*, 3 D. & War. 60; *Lightfoot v. Heron*, 3 Y. & C. Exch. 586; *Lavette v. Sage*, 29 Conn. 577; *Prentice v. Achorn*, 2 Paige, 30; *Crane v. Conklin*, Saxton, 346; *Calloway v. Witherspoon*, 5 Ired. Eq. 128; *Morrison v. McLeod*, 2 Dev. & Bat. Eq. 221; *Whitesides v. Greenlee*, 2 Dev. Eq. 152; *Reynolds v. Waller*, 1 Wash. 164; *Hotchkiss v. Forston*, 7 Yerg. 67. A contract made during a complete intoxication which temporarily suspends all the

## SECTION IX.

*The remedy of specific performance must not be harsh or oppressive.*

SECTION 185. Not only must the agreement be fair and reasonable in its terms and its surrounding circumstances, it is also a well-settled doctrine that its specific execution must not be oppressive—that is, the performance must not be a great hardship to the parties. This rule includes the one treated of in the last section—since every unfair contract is essentially unconscionable and hard—but it is more extensive, since the oppressive nature of the performance may result from the situation or relations of the parties exterior to and unconnected with the terms of the contract itself or the circumstances of its conclusion.(1) The oppression and hardship, therefore, which fall within the scope of the doctrine may result from the unequal, unconscionable provisions of the contract itself, or from external facts, events or cir-

person's faculties, is voidable, and as a matter of course will not be enforced in equity. *Prentice v. Achorn*, 2 Paige, 30; *Clifton v. Davis*, 1 Pars. Eq. Cas. 31; *Donelson v. Posey*, 13 Ala. 752. There are, however, *dicta* to be found in some cases to the effect that mere intoxication, without other incidents of wrong doing on the plaintiff's part, is not a sufficient ground for denying a specific performance. See *Rodman v. Zilley*, Saxton, 320; *Pittenger v. Pittenger*, 2 Green, Ch. 156. In the latter case, especially, there are general *dicta*, which conflict with the rules stated in the text, and which should be restricted to the very facts and circumstances then before the court. A court of equity is always cautious in admitting the defense of intoxication, and especially in rescinding contracts on its account. A man may be quite under the effect of liquor, and still be shrewd, hard in driving a bargain, and every way competent to manage his business; and it is always difficult to ascertain how much a party was really affected by his intoxication. See *Cooke v. Clayworth*, 18 Ves. 12; *Shaw v. Thackray*, 1 Sm. & Gif. 537. For cases in which the effect of weakness of mind was considered, see *Graham v. Pancoast*, 6 Casey, 89; *Nace v. Boyer*, 6 Casey, 90; *Green v. Green*, 9 Gratt. 330; *Thomas v. Sheppard*, 2 McCord Eq. 36.

(1) *Gould v. Kemp*, 2 My. & K. 308, per Lord BROUGHAM; *Kimberly v. Jennings*, 6 Sim. 340; *Willard v. Tayloe*, 8 Wall. 537; *Margraf v. Muir*, 57 N. Y. 155; *Weise's Appeal*, 72 Pa. St. 351; *Marble Co. v. Ripley*, 10 Wall. 339; *Stone v. Pratt*, 25 Ill. 25; *Cathcart v. Robinson*, 5 Peters, 263; *Tobey v. County of Bristol*, 3 Story, 800; *Seymour v. Delancey*, 3 Cow. 445; *Ohio v. Baum*, 6 Ham. 383; *Cannaday v. Shepard*, 2 Jones Eq. 224; *Barnett v. Spratt*, 4 Ired. Eq. 171; in *Clarke v. Rochester, etc.*, R. R. 18 Barb. 350, the railroad had built an embankment on land conveyed to them by the plaintiff, and by means thereof had cut off access to another portion of his land, and under such circumstances the statute required them to construct farm crossings; but as the value of the plaintiff's land thus cut off was slight, and as the cost of constructing the crossing would be out of all proportion to the value of such land, the court refused to compel a

cumstances which control or affect the situation and relations of the defendant with respect to the performance. In either case the resulting hardship may constitute a sufficient ground for a court of equity to withhold its peculiar relief, and to leave the plaintiff to his legal remedy.(1) The general doctrine also extends to the agreements of corporations, as well as to those of private persons.(2)

specific performance of the statutory duty, and left the plaintiff to his remedy by an action at law for damages. In *Wedgwood v. Adams*, 6 Beav. 600; 8 Beav. 103, the doctrine was carried to its utmost limit. Trustees joined in a contract of sale, and personally bound themselves to free the estate from incumbrances. These were large, and it did not appear whether the purchase-money would be enough to pay them all off, nor what would be the amount of the deficiency. Lord LANGDALE refused a specific performance against the trustees in respect to this stipulation, leaving the vendee to his legal action. He said: "I conceive the doctrine of the court to be this; that the court exercises a discretion in cases of specific performance, and directs a specific performance unless it should be what is called highly unreasonable so to do. What is more or less reasonable is not a thing that you can define; it must depend upon the circumstances of each particular case. The court must, therefore, always have regard to the circumstances of each case, and see whether it is reasonable that it should, by its extraordinary jurisdiction, interfere to order a specific performance, knowing at the time that if it abstains from so doing, a measure of damage may be found and awarded in another court. Though you cannot define what may be considered unreasonable, by way of a general rule, you may very well in a particular case come to a balance of inconvenience, and determine the propriety of leaving the plaintiff to his legal remedy by recovery of damages." \* \* \* "After consideration, I think I cannot order a specific performance of the agreement; and with regard to its being a mere money objection, I could not, when this case was argued, call distinctly to mind a case of that sort of which I had some recollection, and which came before Lord HARDWICKE. I think that comes very nearly to a case of merely pecuniary objection." See, also, *Pope v. Harris*, cited Lofft, 791; *Costigan v. Hastler*, 2 Sch. & Lef. 160; *Howell v. George*, 1 Madd. 1; *White's Case*, 3 Sw. 103, n.; *Coote v. Coote*, 1 Sauss. & Scui. 393; *Kimberly v. Jennings*, 6 Sim. 340; *Talbot v. Ford*, 13 Sim. 173; *Ryan v. Danial*, 1 Y. & C. C. 60; *Webb v. Direct London, etc., Ry. Co.*, 1 DeG. M. & G. 521; 9 Hare, 129; *Watson v. Marston*, 4 DeG. M. & G. 230, 230; *Browne v. Coppinger*, 4 Irish Ch. Rep. 72; *Williamson v. Wootton*, 3 Drew. 210; *Tildesley v. Clarkson*, 30 Beav. 419; *Oxford v. Provand*, L. R. 2 P. C. 135. But the court will not, on this ground, refuse to compel a person who was merely an agent to specifically perform his contract of purchase. *Saxon v. Blake*, 29 Beav. 48, and see *Chadwick v. Maden*, 9 Hare, 188.

(1) See cases in last note: *Clarke v. Rochester, etc., R. R.*, *supra*, is an excellent illustration of hardship arising outside of the contract and the obligation imposed by its terms.

(2) *Shrewsbury & Birmingham Ry. Co. v. London & North Western Ry. Co.*, 4 DeG. M. & G. 115; 6 H. L. Cas. 113; where a contract between two railway companies for sharing their business, if carried out, would necessarily divert a considerable part of the business and profits from their legitimate channel on the road of one company, and give them to the other without any corresponding busi-

SEC. 186. *The time to which the hardship must be referred.*—The rule in regard to the time in the progress of the contract at which the element of hardship must first exist, in order that it may be a sufficient ground for denying the equitable remedy, is the same as that in regard to the analogous element of fairness, and it is clear that both rest upon one principle. The statement of the rule and of its various applications and limitations, given in the preceding section, need not, therefore, be repeated.(1) It is true the doctrine has been laid down, as though universal, that if a contract is fair and just when made, no hardship in the performance arising from subsequent events or change of circumstances will influence the judicial discretion of the court in awarding or withholding the relief of specific execution.(2) If this proposition were true, it would necessarily follow that no oppression or hardship in the performance would avail as a defense, unless it inhered in and resulted from the very terms of the contract itself, or the circumstances attending its creation; but the contrary is well settled, and is illustrated by numerous cases in which the objection to enforcing performance arose from the situation or relations of the defendant wholly independent of the contract itself.(3) In certain kinds of agreements, as described in the last Section, a specific performance will not be denied because a change of circumstances, or unforeseen development of events, has rendered it onerous; and a few additional examples are given in the foot-note.(4) In respect to other contracts,

ness and profits allotted by the second company for the benefit of the former, a specific performance was refused, independently of the objection that such a contract was *ultra vires*.

(1) See *ante*, §§ 177, 178.

(2) *Lawder v. Blachford*, Beat. 522; *Webb v. Direct London & Portsmouth R'y Co.*, 9 Ha. 129.

(3) See *ante*, § 178.

(4) Where a lessee of renewable leaseholds covenants with his sub-lessee to renew without fine on every renewal to himself, and subsequently a renewal is made to him, but on far less favorable terms than had been the custom before and at the time he made his covenant—he having, in fact, made his covenant in the expectation that the former practice would be continued in the renewals to himself—he was held bound to renew to his sub-lessee without exacting any payment by way of contribution towards the increased fine which he himself had been obliged to pay. *Evans v. Walshe*, 2 Sch. & Lef. 519; *Revell v. Hussey*, 2 Bail & B. 280; *Lawder v. Blachford*, Beat. 522; *Thomas v. Burne*, 1 Dr. & Wal. 657; *Haywood v. Cope*, 4 Jur. (N. S.) 227. These cases are of very little practical importance in this country, and are cited solely because they belong to and serve to illustrate the species of contracts mentioned in the preceding Section, which, by their terms, contemplate that their operation is to last for an indefinite period. The lessee covenants to renew to his sub-lessee as often as the lease is renewed to himself, and this must continue indefinitely. Again, when railway companies in

not falling under any of these species, it is clear that subsequent events may occur, or circumstances may become changed, which shall render their performance so onerous and oppressive that courts of equity will not decree their execution. Such cases must, of course, be determined each upon its own facts, and it is impossible to lay down

England contract for the purchase of land, and by their own delay and laches their powers under the statute run out before the purchase is completed, they cannot rely upon this fact as any defense against an enforcement at the suit of the vendor. *Hawkes v. Eastern Counties R'y Co.*, 1 DeG. M. & G. 737, 755; 5 H. L. Cas. 331. In these cases the conduct of the defendant itself produced all the difficulty, and it is a very familiar principle that a party cannot, by his own delay, laches, or negligence, create a condition of affairs which shall defeat a liability resting upon him. The practice in relation to the enforcement of awards has been cited as an evidence of a general rule that hardship, arising from future events, is never a defense. It is said, that when the agreement to submit is unfair or hard, it will not be enforced; but that unfairness or hardship in the award itself, will not prevent its enforcement. *Nickles v. Hancock*, 7 DeG. M. & G. 300; *Wood v. Griffith*, 1 Sw. 43. And the reason is given, that the submission, and not the award, is the agreement, and the unreasonableness in the award is matter subsequent, the risks of which the parties have taken upon themselves. See *Fry on Specific Performance*, § 254. This argument is without any real foundation. The courts, for a variety of reasons, never enforce the specific performance of agreements to submit, one reason being that they are revocable. Awards are enforced, not as awards, but as the consummation of the submission; that is, the submission and the award are taken together as constituting one agreement, and are enforced subject to the rules which govern the specific performance of all contracts. Undoubtedly the fact that an award is one-sided, harsh, unfair, will not, of itself in general, prevent its enforcement; but this is so not from any consideration of its being a subsequent event, but because it is a *quasi* judicial act; the parties have chosen their judge and must abide by his decision. These decisions, therefore, have no real bearing, one way or the other, upon the rule under discussion. The general doctrine has been laid down in some decisions, that a change of circumstances, with which plaintiff is not directly nor indirectly connected, will not prevent the enforcement of a contract originally fair, however hard on defendant such enforcement may be. *Hale v. Wilkinson*, 21 Gratt. 75; *Morgan v. Scott*, 2 Casey, 51. But such change may operate against a plaintiff who has been guilty of laches, or been in default. *Garnett v. Macon*, 6 Call. 309; *Booten v. Schaffer*, 21 Gratt. 474; *Whitaker v. Bond*, 63 N. C. 290. Plaintiff must be diligent, prompt, ready; if he delays so that defendant thereby becomes so situated that a specific performance is oppressive, the court may refuse to interfere. *Bank of Alexandria v. Lynn*, 1 Peters, 376; *Porter v. Dougherty*, 1 Casey, 405; *Patterson v. Martz*, 8 Watts, 374. Courts may, under such circumstances, take into account the effects upon third persons who have acquired rights by purchase, descent, or devise. *Johnson v. Hubbell*, 2 Stock. Ch. 332; *Patterson v. Martz*, 8 Watts, 374; *Anthony v. Leftwich*, 3 Rand. 238. Contracts made in confederate currency, which was destroyed by the end of the rebellion, were not enforced in *Hudson v. King*, 2 Heisk. 561; *McCarty v. Kyle*, 4 Cold. 349; per *contra*, were enforced in *Hale v. Wilkinson*, 21 Gratt. 75; *Booten v. Schaffer*, 21 Gratt. 474.

any general rule for their government. Some examples are placed in the foot-note.(1)

SEC. 187. The rule concerning the time of the hardship is subject to modifications in its application to certain special states of fact. If the subsequent events or change of circumstances, which have so altered the situation or relations of the defendant as to render a performance by him oppressive, or unduly onerous, were the acts of the plaintiff, or acts done by his direction or under his control, it is very clear and very just that the hardship thus caused, if sufficiently great, will prevent a specific execution of the agreement. As the inequality, unreasonableness, or difficulty of carrying out the contract in such cases, must be referred directly to the plaintiff, it would be highly inequitable to enforce performance upon the defendant.(2) But it is

(1) Willard v. Tayloe, 8 Wall. 557; City of London v. Nash, 3 Atk. 512; 1 Ves. Sen. 12; Costigan v. Hastler, 2 Sch. & Lef. 160. City of London v. Nash, *supra*, is the leading case. A party had covenanted to *rebuild* several houses. He built only two of them and repaired the others, spending between 2,000*l* and 3,000*l*, and putting them in excellent condition, so that they were made substantially as good as new; but still he had not performed his agreement. A bill was filed to compel a specific performance. To do so defendant would be obliged, among other things, to pull down all the houses he had repaired, and thus all the labor and money spent upon them would be thrown away, and the additional cost would be very great. Lord HARDWICKE held 1, that the contract was one of which the specific performance could be enforced; but 2, that the enforcement would be such a hardship upon the defendant, requiring such a great outlay, and would be of so little benefit to the plaintiff, that the court would not grant the remedy, either whether defendant was merely mistaken in his interpretation of the agreement or whether he had, perhaps, intentionally disregarded it. This is a very strong case, indeed, for it will be noticed that the hardship in performance was entirely the result of defendant's own conduct, and, perhaps, even his designed conduct; and also, that the hardship arose wholly from acts subsequent to the contract, and independent of its provisions. Judge STORY cites this case as authority for the rule which he lays down. §§ 750, 776. In Costigan v. Hastler, *supra*, a mortgagor agreed to give a lease, supposing that he could obtain the mortgagee's consent; he did not obtain the consent, and was so situated that he could not, without great difficulty, pay off and redeem from the mortgage; the expected lessee sued for a specific performance, but it was refused, because the only way it could be enforced was by compelling the defendant to pay off the mortgage, and thus get out of the hands of the mortgagee, and this would be exceedingly oppressive; but the court granted the remedy of rescission, which the plaintiff had prayed for in the alternative.

(2) Duke of Bedford v. Trustees of the British Museum, 2 My. & Ke. 552, is the leading case. The Duke of Bedford occupied the Southampton House, in London, as his family mansion, and in 1675 conveyed some land adjoining to Mr. Montague for the purpose of erecting thereon a dwelling, with gardens, etc. Mr. M built a fine house, long known as the "Montague House." He was required, by the Duke of Bedford, to enter into covenants not to use the land in certain modes which would



equally clear and just, on the other hand, that if the subsequent events or change in circumstances which have produced the hardship, were the acts of the defendant—the party against whom the remedy is sought—or were acts done by his direction or under his control, the oppressive character of the performance cannot be a valid objection to a specific enforcement of his agreement.(1) But even then the performance must be, in the language of an eminent judge, “reasonably possible,” since otherwise it may be refused.(2)

SEC. 188. *What are hardships.*—Thus far I have spoken of the time when the hardship must take its origin, and only incidentally of what the hardship itself must be. I now proceed to inquire, as far as is practicable, into the nature of the hardship which can be a valid objection to the equitable remedy, and some of the common forms in which it appears. It may arise from either of three sources: 1st, From

interfere with the pleasantness of the Southampton House as a private residence; these covenants being expressly for the purpose of keeping the Southampton House free from any neighborhood annoyances. Years after the Duke of Bedford, and those holding under him, pulled down the Southampton House, and turned the whole land covered by it and its grounds into city property, running streets, and building it up with houses, stables, etc. After that the owner of the Montague House began to do the same kind of work on his own property, and to transform it in a way which expressly violated all of the aforesaid covenants. On a bill by the duke's successors, Lord ELDON, chancellor, and Sir T. PLUMER, M. R., held that as the plaintiffs had themselves so altered the whole position and relations of the matter, and so changed their own property, that it would be very hard and unjust on the defendant to enforce the covenants, a specific enforcement by way of injunction was denied, and the plaintiffs were left to their action for damages, which would be hardly more than nominal. See, also, *Shrewsbury, etc., R'y Co. v. Stour-valley R'y Co.*, 2 De. G. M. & G. 832, per Knight BRUCE, L. J. Also, when a plaintiff, a covenantee, has long acquiesced in a departure from the mode of renewing a lease provided for by a covenant, this was held a reason for refusing to enforce the covenant according to its literal terms. *Davis v. Hone*, 2 Sch. & Lef. 341. The same doctrine has been held in American decisions. Thus, it is said that a contract, unreasonable in its inception, and one made so by the subsequent acts of the plaintiff, are to be treated alike; as, for example, when, through the vendor's fault, the property has greatly depreciated in value, so that the vendee's interests might be prejudiced, a specific performance at the vendor's suit would be refused. *Garnett v. Macon*, 6 Call. 303; 2 Brock. 185; and see *Ford v. Herron*, 4 Mumf. 316; *Clay v. Turner*, 3 Bibb, 52; *Marble Co. v. Ripley*, 10 Wall. 339.

(1) *Pembroke v. Thorpe*, 3 Sw. 443, n. per Lord HARDWICKE; the case of a railroad company contracting for purchase of land, and then delaying to complete until its statutory powers have been lost by efflux of time, is an example. *Hawkes v. Eastern Counties R'y Co.*, 1 De. G. M. & G. 737, 755; 5 H. L. Cas. 331; *Helling v. Lumley*, 3 De. G. & J. 493.

(2) In *Storer v. Great Western R'y Co.*, 2 Y. & C. C. C. 52, per Knight BRUCE, V. C. The case of *City of London v. Nash*, 3 Atk. 512; 1 Ves. Sen. 12, is an example.

the express provisions of the contract, so that it must be, in general, assumed to have been contemplated by the parties as a possible or probable result of their transaction ; 2d, From something collateral or incidental to, but still connected with the contract, and because not involved in the express provisions not therefore so likely to have been suggested to the parties as possible ; at all events, there is no presumption that it was thus foreseen ; and 3d, From events and circumstances entirely independent of any provisions of the contract—perhaps arising subsequently—and, therefore, a result which the parties could not have expected nor anticipated. In the first of these cases the hardship must be much greater than in either of the others, in order to prevent a decree of enforcement. And here it is important to carefully distinguish two matters which are, perhaps, liable to be confounded, but which are really very different both in their objects and in their effects. I mean the objection of hardship in the provisions of an agreement, urged as an argument to prevent a court from interpreting them in a particular manner, and the same objection when the meaning of the terms is established, urged as a defense to the relief of specific performance. The objection, when taken for the former purpose has little weight ; and in fact none at all, unless the construction, all other things having being considered, remains fairly doubtful.(1) But this rule of interpretation cannot be applied to the objection when raised in the second case, for otherwise it would overthrow the whole equitable doctrine respecting the enforcement of oppressive agreements.

SEC. 109. It never constitutes a sufficient hardship within the meaning of the doctrine, that the final object to attain which was the motive for the party's entering to the contract, has wholly failed, so that an accomplishment of the proposed result will be entirely impossible. While equity may relieve against terms of a contract which are oppressive in themselves, or which are made so by external facts intimately related with the performance, it does not take account of the motives of advantage, or disadvantage, which have led a party

(1) As an illustration, in *Prebble v. Boghurst*, 1 Sw. 309, 329, an agreement was under consideration, by one construction of which the children by a first marriage would have all the estate of their father, and the children by a second marriage—the defendants—relying upon the hardship to them resulting from this construction, Lord ELDON said: "Unless hardship arises to a degree of inconvenience and absurdity so great that the court can, judicially, say such could not be the meaning of the parties, it cannot influence the decision." While this rule is a familiar one in respect to the construction of agreements, it is wholly foreign to the subject of specific performance.

to enter into the engagement, nor relieve him merely because his calculation of profit and loss turns out to have been erroneous. If, for example, a person contracts for the purchase of a tract of land, with the intention of cutting it up into city lots and thus making a large profit, the total failure of his speculation, entailing even a heavy loss, will not, of itself, unconnected with other facts, prevent a decree compelling him to complete the purchase and pay the price. If the rule were otherwise, the obligation to perform would virtually depend upon the pecuniary success and advantage of contracts.(1) In agreements made by corporations, also, the fact that a performance may produce inconvenience or hardship to one or more of the corporators, furnishes no sufficient ground for refusing to specifically enforce them against the companies.(2)

SEC. 190. It is well settled, that when the performance of a contract will render the defendant liable to a forfeiture, the performance is a hardship, within the meaning of the general rule, and will not be decreed.(3) If, however, such liability is not a necessary, or natural

(1) *Adams v. Weare*, 1 Bro. C. C. 567. A person agreed to purchase, at a very large price, certain land for the purpose of erecting a mill thereon; but before he could erect the mill the consent of a corporation was necessary, which, when making his purchase, he expected to obtain; the consent, however, was refused, and so his speculation utterly failed. *Held*, that these facts formed no defense to a suit against him for a specific performance. Also, *Webb v. Direct London & Portsmouth R'y Co.*, 9 Ha. 140, per TURNER, V. C. ; *Lord James Stuart v. London & North Western R'y Co.*, 15 Beav. 523, per Sir J. ROMILLY, M. R. ; *Edwards v. Grand Junction R'y Co.*, 1 My. & C. 674, per Lord COTTENHAM ; *Hawkes v. Eastern Counties R'y Co.*, 1 DeG. M. & G. 737, 754. As a general proposition, mere improvidence in making the contract, or a decline in the value of the subject-matter, is not such a hardship as will defeat a specific performance, in the absence of fraud, or mistake, or positive wrong-doing by the plaintiff. *Lee v. Kirby*, 104 Mass. 420 ; *Booten v. Scheffer*, 21 Gratt. 474 ; *Corson v. Mulvany*, 13 Wright, 88, 97. But very improvident bargains are, in extreme cases, not enforced. See *Henderson v. Hays*, 2 Watts, 148, 151 ; *Campbell v. Spencer*, 2 Binney, 133.

(2) *Edwards v. Grand Junction R'y Co.*, 1 My. & C. 674, per Lord COTTENHAM : "The court cannot recognize any party interested in the corporation, but must look to the rights and liabilities of the corporation itself." Also, *Hawkes v. Eastern Counties R'y Co.*, 1 DeG. M. & G. 737, 754, per Lord COTTENHAM. There is an exception, however, in the case where the performance by the directors or managers of the corporation would be a breach of trust as against individual stockholders. *Shrewsbury, etc., R'y Co. v. London & North Western R'y Co.*, 4 DeG. M. & G. 115 ; 6 H. L. Cas. 113.

(3) *Faine v. Brown*, cited 2 Ves. Sen. 307. Where a person was devisee of a small estate, but on condition that if he sold it within twenty-five years his brother would be entitled to one-half of the purchase-money. He contracted to sell the land; but Lord HARDWICKE, in a suit by the vendee, refused to decree a performance, holding that the forfeiture was a sufficient hardship to prevent the

effect of the agreement when originally made, but arises from the subsequent acts or omissions of the defendant himself, it will not avail to prevent a specific enforcement.(1) A special rule has been established by the English decisions, that where a vendor is bound by certain covenants in reference to the land, and has not been expressly indemnified against them by the purchaser in their contract, the vendee, on becoming aware of them, either through provisions in the agreement itself or after the agreement has been concluded, cannot compel the vendor to perform without giving him an indemnity, and will himself be compelled at the suit of the vendor either to indemnify him against such covenants or to rescind the agreement. The reason given is, that otherwise the vendor would cease to be owner of the land, and yet remain personally liable in respect to the land.(2) This rule seems necessary in England, where the practice as to conveyancing is so complex, and where there is no general system of registry; in this country where the registry laws prevail, and furnish the means for ascertaining all the particulars concerning titles, there is no apparent necessity for the rule, and it probably would not be followed. Several particular cases of hardship, which admit of no general classification, are placed in the foot-note.(3)

relief. *Peacock v. Penson*, 11 Beav. 355. A lessee contracted to sell certain building lots, and to make a road, but found that he could not make the road without rendering himself liable to forfeit the land through which it would run, and which he held on a lease, or liable to be sued by the lessor. The court thereupon, granting to the vendee a specific performance of the agreement to sell, refused to enforce this stipulation, but awarded compensation in respect of it. *Henderson v. Hays*, 2 Watts, 148, 151; *Campbell v. Spencer*, 2 Binney, 133.

(1) See *Helling v. Lumley*, 3 DeG. & J. 493, 498, 499, per TURNER, L. J. "The court must look at the fact by whose acts and conduct the forfeiture would be occasioned. The court will not permit a defendant to put himself in such a position as that his performance of his agreement shall create a forfeiture, and then to turn round and say that the plaintiff shall not have a specific performance of the agreement, because the defendant has, by his own act, enabled the landlord to enter upon the agreement being performed. \* \* \* If then he (defendant) has put it out of his power to perform the agreement constituted by the reservation, the consequences must fall upon him, and not on the plaintiff." For the facts of this case, see *ante*, under § 180.

(2) *Moxhay v. Inderwick*, 1 DeG. & Sm. 708; *Lukey v. Higgs*, 24 L. J. Ch. 495.

(3) *Wedgwood v. Adams*, 6 Beav. 600. Trustees united with their beneficiaries in a contract of sale, and personally covenanted that the land should be cleared from all incumbrances; the purchase-money did not appear to be sufficient to pay off these incumbrances; nor did it appear how much the deficiency would be. On this account, because the trustees had thus assumed a heavy pecuniary burden, without any real interest, which was deemed a great hardship, the court refused to compel a specific performance, although the purchaser—the plaintiff—was in

SEC. 191. Contracts for the sale of reversionary and other future estates, are always regarded by the court of equity with great suspicion, and are enforced with the greatest caution on account of their always probable and almost always certain hardship upon the vendor. It is a familiar rule in England, where such transactions are much more frequent than in this country, that agreements by heirs and others

possession of the property, and to get him out would itself be a matter of great difficulty. *Watson v. Marston*, 4 DeG. M. & G. 230. A mortgagee, with power of sale, had obtained a decree of foreclosure, and intended to sell under it as the owner. He made a contract of sale, but by accident in drawing up the written agreement a clause was inserted whereby he was made to sell as a mortgagee under his power. The vendee insisted on a conveyance under the power in accordance with this stipulation, while the vendor was willing to convey as owner under the decree. The court held, in a suit by the purchaser, that the risk which the vendor would run of opening the foreclosure decree by a sale under his power was such a hardship as he should not be forced to assume, and, therefore, refused to grant the plaintiff any relief except that of a conveyance by the vendor as owner under the decree. In this country such a controversy could not arise, since a title under a foreclosure would be very much preferred to a title under the power of sale contained in the mortgage. In *Dean of Ely v. Stewart*, 2 Atk. 44, an ecclesiastical lease contained a covenant, on part of the lessee, to leave the buildings in repair. It appearing that the same description of the buildings had been continued without variation from lease to lease for a long time, whence it might be inferred that the particular buildings in question were not in being at the time when the original lease was made, Lord HARDWICK refused to enforce this covenant on the ground of its hardship. *Talbot v. Ford*, 13 Sim. 173. A lessee of mines covenanted, that if the lessor should at any time before the end of the lease give notice of his intention to take the machinery and fixtures, etc., the lessee would, at the end of the lease, give up all the articles mentioned in the notice upon the lessors paying their value, to be ascertained by valuers. The court held this covenant to be so oppressive and injurious to the lessee, that it both refused to decree its specific performance or to restrain its breach by injunction. In *Hamilton v. Grant*, 3 Dow P. C. 33, 47, A., upon B.'s agreeing not to join in barring an entail, contracted to convey to B., his heirs or assigns, the fee of such parts of the estates, which lay in three counties, as he or they should choose, to the yearly value of £200. The House of Lords refused a specific performance, among other reasons, because of the great inconvenience and hardship which this option might bring upon the party. In *Kimberly v. Jennings*, 6 Sim. 340, a contract by which a young man virtually put himself under the power of a business firm for his entire life as their clerk, was held to be so oppressive that its execution was refused. But in *Chaton v. Gower*, Finch, 164, where a life-tenant had agreed to give a mining lease, and when sued for a specific performance objected that as a life-tenant he had no power to give such a lease, and would be liable for waste, Lord NOTTINGHAM only admitted this defense partially, and decreed that he should convey as far as he could. It should be remarked, that in a class of cases, analogous to this, the court compels a partial enforcement instead of denying all relief. See, also, the cases heretofore cited. *Willard v. Tayloe*, 8 Wall. 557; *Fish v. Leser*, 69 Ill. 394; *Stone v. Pratt*, 25 Ill. 25; *Blackwilder v. Loveless*, 21 Ala. 371.

similarly situated, to sell their expectant or reversionary interests for any consideration less than the full value, will never be specifically enforced, since the vendor is necessarily placed at the mercy of the buyer.(1) In all such cases the burden is thrown upon the purchaser of demonstrating the fairness of the arrangement, and of proving that the price was the full value of the property; failing in this, he can obtain no relief in equity.(2) This rule, however, is not applied where the expectant or reversionary estates are sold at public auction.(3)

(1) *Playford v. Playford*, 4 Hare, 546.

(2) *Kendall v. Beckett*, 2 R. & My. 88; *Hincksman v. Smith*, 3 Russ. 433. The principle of this rule will doubtless be applied in analogous cases by the American courts of equity, although sales by heirs of their expectancies, etc., are, from the nature of our social habits and real estate law, not common in the United States. The following American cases are somewhat analogous in principle to the class of decisions referred to in the text, and seem to be, in part at least, controlled by the same doctrine. *Mercier v. Mercier*, 50 Geo. 546. A father having two children, A. and B., had threatened to disinherit A. in case A. contracted a certain marriage; the two children, therefore, made an agreement by which the property that the father might bequeath to B. alone, should be divided equally between them; *held*, that this agreement would not be enforced. See this case for a discussion of the question, when contracts to divide expectant estates will be, or will not be specifically enforced. The contract of an heir expectant to convey what land he may inherit, will not be enforced. *Lowry v. Spear*, 7 Bush (Ky.) 451; but *per contra*, see *Power's Appeal*, 63 Pa. St. 443; *Mastin v. Marlow*, 65 N. C. 695, which hold that such a contract is binding, and a specific performance thereof will be compelled. Courts of equity will, under special circumstances, enforce a contract to make a will or to make a certain testamentary disposition; and this may be done even when the agreement was parol, where in reliance upon the contract the promisee has changed his condition and relations, so that a refusal to complete the agreement would be a fraud upon him. The relief is granted, not by ordering a will to be made, but by regarding the property in the hands of the heirs, devisees, assignees, or representatives of the deceased promisor, as impressed with a trust in favor of the plaintiff, and by compelling defendant, who must of course belong to some one of these classes of persons, to make such a disposition of the property as will carry out the intent of the agreement. See the following cases which treat this doctrine under various circumstances: *Logan v. Wienholt*, 7 Bligh, 53, 54; *Moorhouse v. Colvin*, 9 Eng. L. & Eq. 136; *Van Duyne v. Vreeland*, 1 Beasley Ch. 142; 3 Stockf. 370 (a very able and instructive case); *Wright v. Tinsley*, 30 Mo. 339; *Gupton v. Gupton*, 47 Mo. 37; *Sutton v. Hayden*, 62 Mo. 101; *Frisby v. Parkhurst*, 29 Md. 58; but see *Cox v. Cox*, 26 Gratt. 305; *Sprinkle v. Hayworth*, 26 Gratt. 384, in which the agreements were not enforced.

(3) *Shelly v. Nash*, 3 Mad. 232. There are two grounds upon which this exception rests: 1. The essential nature of an auction sale, which, being public and open to competition, takes away the opportunity of fraud, overreaching and oppression in the bargaining. In the language of Sir JOHN LEACH, M. R., as used in the case just cited (p. 286): "There being no treaty between the vendor and purchaser, there can be no opportunity for fraud or imposition on the part of the purchaser. The vendor is in no sense in the power of the purchaser." 2. The

Nor does the rule apply when both the reversioner and the life-tenant unite in the agreement of sale, since the reason of it thus fails, the two representing the whole estate as a unit, and therefore standing upon an equal footing with the purchaser.(1) This exception, however, is subject to the limitation that the present interest sold, with the future estate, must be a substantial one and considerable in amount; the joining of any present interest or interest in possession in the contract, does not obviate the rule as to reversions.(2) Finally, a contract of sale will not be enforced against a purchaser, whenever from the situation of the subject-matter, or other circumstances, he could have no reasonable or substantial enjoyment of the property which he had bought.(3)

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## SECTION X.

### *Inadequacy of the consideration.*

SECTION 192. Intimately connected with the subjects treated of in the two preceding sections is that of inadequacy in the consideration, which would seem to be merely a particular instance of unfairness and hardship; and, in the absence of authority, to be governed by the same doctrines which have been settled concerning those incidents of an agreement. This speculative opinion, however, would be misleading. The courts, on grounds of expediency and convenience rather than of principle, have established different rules concerning

market value of the land is the only test by which courts decide upon the value of the land, and in all judicial proceedings an auction sale, when regularly and fairly conducted, is always regarded as the most direct and certain manner of ascertaining what that market price is. It is for this reason that all judicial sales are required to be by public auction, and also all sales by private persons, which are intended to cut off the rights of others, to foreclose liens, and the like. Of course, if it could be shown that the auction was a mere form, and that it was prearranged so as to cut off competition or carry out a previous bargain, this exception would fail. See *Wardle v. Carter*, 7 Sim. 470; *Borell v. Dann*, 2 Hare, 452, per WIGRAM, V. C.; *Earl of Aldborough v. Trye*, 7 Cl. & Fin. 436, 460; *Edwards v. Burt*. 2 DeG. M. & G. 55.

(1) *Wood v. Abrey*, 3 Mad. 417, in which it was said that the life-tenant and the reversioner joining in the contract, "form a vendor with a present interest," and see *Wardle v. Carter*, 7 Sim. 490.

(2) *Davis v. Duke of Marlborough*, 2 Sw. 154, per Lord ELDON; *Earl of Portmore v. Taylor*, 4 Sim. 182.

(3) *Denne v. Light*, 26 L. J. Ch. 459; 3 Jur. (N. S.) 627, a person bought a piece of land to which there was no way, the contract being silent in respect to a way.

inadequacy of consideration, which it is the object of the present section to state and explain. Inadequacy may exist either in the purchase-price, or in the thing itself which is the subject-matter of the contract—as, for example, the land agreed to be sold—the latter case being the same as exorbitancy in the price.<sup>(1)</sup> As an incident of the contract, therefore, it necessarily implies that the price is either too small or too great. Inadequacy in the price, that it is too small, will be objected by the vendor, either as a defense to a suit brought *against* him for a specific performance, or as the ground of a suit brought *by* him for a rescision. Inadequacy in the subject-matter, that the price is exorbitant, will be objected by the vendee in a suit *against* him to enforce a specific performance, or in a suit *by* him to obtain a rescision. It is very evident that the former objection is more susceptible of judicial determination than the other. A court can, with comparative ease, ascertain whether the price paid for certain land is less than its fair market value; but may find it impossible to decide, with any accuracy, of how great or of how little value a particular parcel of land might appear to a particular individual, to fix the amount in other words, which he ought to be willing to pay for it, and which he ought not to exceed. Inadequacy, in both these forms, may be considered: 1st, By itself free from any other fact; 2d, As connected with other facts and circumstances of overreaching, concealment, and the like. I shall follow this order of treatment.

SEC. 193. *Inadequacy, pure and simple.*—The doctrine is well settled, both in England and in this country, that mere inadequacy of consideration, either in the price or in the subject-matter, unaccompanied by other elements of bad faith, is never a sufficient ground for rescinding a contract on account of the hardship thereby resulting from a performance; unless the inadequacy is so excessive as to furnish satisfactory evidence of fraud, and the fact of fraud established in this, as well as in any other manner, is always fatal to the validity of an agreement. In other words, mere inadequacy of price, considered as an element in suits brought for the rescinding of contracts, is never an *end*, but only a *means* in the judicial proceeding; it is simply evidence of fraud. Since the principle is now universally

(1) See *Hamilton v. Grant*, 3 Dow. 33. It is said that the inadequacy may also consist in some inequality in the contingencies referred to by the contract; but this is giving the term a far too extensive meaning and application, and making it synonymous with “unfairness” or “inequality.” Inadequacy must necessarily inhere in the price, and can only cover the two cases of the price being too small or too large. For a case where a specific performance was refused, because the consideration had failed, see *Butman v. Porter*, 100 Mass. 337.



admitted that fraud is a fact, inferred like other conclusions of fact from the evidence, with the aid of convenient presumptions, no rule of law can be laid down as to the amount of inadequacy necessary to produce the resulting fraud. I think, also, for the same reason, that the old manner of stating the doctrine, viz. : that the inadequacy must be conclusive evidence of fraud, is erroneous. The true doctrine is, that fraud is always a sufficient ground for the rescission of agreements ; inadequacy of consideration is evidence of fraud, slight or powerful, according to its amount, and other circumstances ; when it is satisfactory, or in other words, when, from the proof of the inadequacy, the triers, jury or judge, are convinced that fraud, as a fact, did exist, then the rescission follows as a necessary consequence, by operation of law. Instead, therefore, of saying that the inadequacy must be so great as to be conclusive evidence of fraud, I prefer to state the rule as follows : When the inadequacy of the consideration is such as to be satisfactory evidence of fraud, the fraud, so proved, is a ground for setting aside the contract. (1)

SEC. 194. The important question for our consideration is: How far will the inadequacy avail as a defense to the relief of specific per-

(1) *Griffith v. Spratley*, 1 Cox, 333, 338, 339 ; *Fox v. Mackreth*, 2 Dick. 689 ; *Stilwell v. Wilkins*, Jac. 280 ; *Osgood v. Franklin*, 2 Johns. Ch. 1 ; *Wintermute v. Snyder*, 2 Green's Ch. 489 ; *McCormick v. Malin*, 5 Blackf. 509 ; *Knobb v. Lindsay*, 5 Ham, 468 ; *Wright v. Wilson*, 2 Yerg. 294 ; *Hardeman v. Burge*, 10 Yerg. 202 ; *Green v. Thompson*, 2 Ired. Eq. 365 ; *Butler v. Haskell*, 4 Dessau Eq. 651 ; *Juzan v. Toulmin*, 9 Ala. 662 ; *Delafield v. Anderson*, 7 Smed. & Mar. 630 ; *Holmes v. Fresh*, 9 Mo. 201 ; *White v. Flora*, 2 Overton, 426 ; *Stubblefield v. Patterson*, 3 Heyw. 128 ; *Newman v. Meek*, 1 Freem. Ch. 441 ; *Kiddler v. Chamberlin*, 41 Vt. 62 ; *Worth v. Case*, 42 N. Y. 362 ; *Davidson v. Little*, 10 Harris, 245, 252 ; *Harris v. Tyson*, 12 Harris, 347, 360 ; *Cribbins v. Markwood* 13 Gratt. 495 ; *Eyre v. Potter*, 15 How. (U. S.) 42. Where it appears that the parties have knowingly and deliberately fixed upon any price, however great or however small, there is, of course, no occasion nor reason for interference by a court, for owners have a right to sell their property for what they please, and purchasers have a right to pay what they please. See *Harris v. Tyson*, 12 Harris, 360 ; *Davidson v. Little*, 10 Harris, 245, 247. But where there is no evidence of such knowledge, intention or deliberation by the parties, the disproportion between the value of the subject-matter and the price, may be so great as to warrant the court in inferring therefrom the *fact* of fraud. Such a gross inadequacy or disproportion between the value of the subject-matter and the price, will certainly call for explanation, and shift the burden of proof upon the party seeking to enforce the contract, and call upon him to show, affirmatively, that the price was the result of a deliberate and intentional action by the parties ; and if he fails to prove such action, the fact of fraud will be more readily and clearly inferred. This, as it seems to me, is the true theory, and the language of some of the earlier cases upon this subject, is, therefore, misleading. See *Davidson v. Little*, 10 Harris, 245, 247, and other cases cited in the former part of this note.

formance? The earlier English cases professedly treated it merely as a particular instance of unfairness, or hardship, and the rule was established by them, for a while, that simple inadequacy, either in the price or in the value of the subject-matter, wholly independent of any suggested fraud—that is, without treating it as furnishing evidence of fraud—may prevent the court from decreeing the execution of an agreement, on the ground that such inadequacy renders the contract unfair, unequal, or oppressive.(1) The same opinion has been maintained by American judges of the greatest ability and experience; and the rule still remains in several of the states.(2) Notwithstanding these early authorities Lord ELDON, as Chancellor, and Sir WILLIAM GRANT, as M. R., introduced the doctrine which has since their time prevailed unchallenged in the English court, and has, although not without strong dissent and protest, been generally followed throughout the United States, that mere inadequacy in the price or the subject-matter is not such a hardship or unfairness as will prevent the enforcement of contracts; but that when the inadequacy furnishes satisfactory evidence of fraud, the remedy of specific performance will be refused. In short, inadequacy as a negative defense against the relief of execution, and as an affirmative ground for the relief of rescission, are put upon an equal footing and governed by the

(1) In *Tilly v. Peers*, cited arg., 10 Ves. 301, Ch. B. EYRE declared, concerning such an agreement, even where there was no suggestion of fraud, that “the court upon the mere consideration of its being so hard a bargain will not enforce it.” In *Day v. Newman*, 2 Cox, 77, cited arg., 10 Ves. 300, a contract was made for the sale of an estate worth 10,000*l*, for 6,000*l* down and 4,000*l* payable at the death of a person sixty-five years old, without any fraud, pressure, or other inequitable incidents. Lord ALVANLEY refused a specific performance solely because it was a hard bargain, but at the same time refused to decree a rescission. In *Savile v. Savile*, 1 P. Wms. 745; 5 Vin. Abr. 516, pl. 25, a person, during the South Sea mania, contracted to buy a house for 10,500*l*, paying a deposit of 1,000*l*. Lord Ch. MACCLESFIELD refused to enforce the contract against the vendee on his forfeiting the deposit, on the ground that the whole nation was at the time in a condition of financial excitement, almost insanity, and the values put upon all property were imaginary—in this instance as well as in others.

(2) See *Seymour v. DeLancey*, 6 Johns. Ch. 222, 224, 225, in which Chancellor KENT, after a very elaborate and exhaustive review of all the then existing authorities, English and American, including those opposed to his conclusion, held that mere inadequacy of price would be a defense, since it rendered the contract unreasonable, unequal, and hard. His decree was reversed by a bare majority of the court of errors, in *Seymour v. DeLancey*, 3 Cow. 445, notwithstanding a most able opinion, concurred in by all the supreme court judges, which maintained Chancellor KENT's views. See, also, *Clitherall v. Ogilvie*, 1 Dessaus. Eq. 257; *Gasque v. Small*, 2 Strobb. Eq. 72; *Clements v. Reid*, 9 Sm. & Mar. 535.

same rule.(1) Where a sale is made at a public auction, conducted in a fair and open manner, with opportunity for a real competition, the rule is even more stringent; for in such case fraud cannot be inferred from any inadequacy in the price, without other circumstances showing bad faith.(2) The formula, that the inadequacy "must be so

(1) *Coles v. Trecothick*, 9 Ves. 246, per Lord ELDON: "Unless the inadequacy of price is such as shocks the conscience and amounts, in itself, to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance." *Stilwell v. Wilkins*, Jac. 282, per Lord ELDON; *White v. Damon*, 7 Ves. 30, per Lord ELDON; *Underhill v. Horwood*, 10 Ves. 209, per Lord ELDON; *Burrowes v. Lock*, 10 Ves. 470, per Sir WM. GRANT; *Lowther v. Lowther*, 13 Ves. 103, per Lord ERSKINE; *Collier v. Brown*, 1 Cox, 428; *Bower v. Cooper*, 2 Hare, 408; *Borell v. Dann*, 2 Hare, 450; *Griffith v. Spratley*, 2 Bro. C. C. 179; 1 Cox, 383; *Stephens v. Hotham*, 1 K. & J. 571; *Abbott v. Sworder*, 4 DeG. & Sm. 448. Land was bought for 5,000*l*, which V. C. Knight BRUCE held to be worth only 3,500*l*; but he and Lord ST. LEONARDS held that this excess of price was no objection to decreeing a specific performance at the suit of the vendor. American cases hold the same rule. *Seymour v. DeLancey*, 3 Cow. 445; *Hale v. Wilkinson*, 21 Gratt. 75, decided very recently in accordance with this doctrine; *Garnett v. Macon*, 2 Brock. 185; *Rodman v. Zilley*, Saxton, 320; *White v. Thompson*, 1 Dev. & Bat. Eq. 493; *Fripp v. Fripp*, Rice Eq. 84; *Bean v. Valee*, 2 Mo. 126; *Lee v. Kirby*, 104 Mass. 420; *Booten v. Scheffer*, 21 Gratt. 474; *Curlin v. Hendricks*, 35 Tex. 225; *Western R. R. v. Babcock*, 6 Metc. 346; *Black v. Cord*, 2 Har. & G. 100; *Burtch v. Hogge*, Harring. Ch. 31; *Crocker v. Young*, Rice Eq. 30; *Sarter v. Gordon*, 2 Hill Ch. 121; *Harrison v. Town*, 17 Mo. 237; *Cathcart v. Robinson*, 5 Peters, 263. In *Seymour v. DeLancey*, 3 Cow. 445, the opinion of the senator, concurred in by the majority, said: "It is not to be denied that it is the settled doctrine of the court of chancery, that it will not carry into effect, specifically, a contract when the inadequacy of the price amounts to conclusive evidence of fraud." In *Cathcart v. Robinson*, 5 Pet. 263, the United States supreme court said: "Excess of price over value, though considerable, if the contract be free from imposition, is not, in itself, sufficient to prevent a decree for specific performance." In *Westervelt v. Matheson*, 1 Hoff. Ch. 37, land was purchased for \$2,900, and its highest value being assumed to be \$3,500, the court held that the inadequacy was not sufficient to infer any fraud. In *Viele v. Troy & Boston R. R.*, 21 Barb. 381, the rule was stated, that in a suit for a specific performance, a court of equity will not inquire into the adequacy of the consideration, unless the inadequacy is so great as to raise a conclusive presumption of fraud.

(2) *White v. Damon*, 7 Ves. 30, per Lord ELDON, who was of opinion that a sale at auction could not be impeached for mere inadequacy of price. *Borell v. Dann*, 2 Hare, 450, per WIGRAM, V. C.: "Fraud in the purchase is of the essence of the objection to the contract on the ground of inadequacy. The only exception to the rule for decreeing the specific performance of an unexecuted contract, on the ground of inadequacy of consideration, is that it is so gross that, of itself, it proves fraud or imposition on the part of the purchaser. The case, however, must be strong indeed in which a court of justice shall say that a purchaser at public auction, between whom and the vendor there has been no previous communication affecting the fairness of the sale, is chargeable with fraud or imposition only because his bidding did not greatly exceed the amount of the vendor's bidding."

great as to be of *itself* conclusive evidence of fraud," was first used at a time when courts were in the habit of regarding fraud as a conclusion of law, established by means of legal presumptions, and it has been, like so many other expressions, unthinkingly and carelessly repeated by case after case, without any notice of the complete revolution which has taken place in the theory of fraud. As fraud is now regarded as a fact, and its existence is ascertained, like that of any other fact, by comparing and weighing the evidentiary matter, it is plain that the phrase "conclusive evidence of fraud" is, from the very nature of the case, an absurdity and impossibility; what would be abundantly conclusive to one judge or jury will come far short of convincing another judge or jury. The phrase, and the thought which it contains, belongs alone to a system in which fraud is always the result of legal presumptions. Inadequacy is evidence, and the only rule which can possibly be laid down is, that it must be, to the judgment of the triers, satisfactory evidence of the fraud.(1) The rule thus finally settled by the cases, is plainly founded upon motives of convenience and not upon the analogies of principle. Thoretically considered, inadequacy in the price, or of subject-matter, is a species of inequality and unfairness, and may be an instance of hardship and oppression. That it is not governed by the general rules applicable to these incidents of a contract, is due entirely to the great difficulty of deciding, in each particular controversy, upon the numerous and different considerations and motives which enter into and affect the question. Rather than meet this difficulty, which necessarily arises

See, also, *Ayers v. Baumgarten*, 15 Ill. 444. An auction sale will be rescinded, and *a fortiori* a specific performance will be refused, on proof of actual fraud in conducting it, or that the buyer controlled it. *Byers v. Surget*, 19 How. (U. S.) 309.

(1) That is, the judge or jury must, from the fact of inadequacy, the extent of it, be convinced that the party was actually guilty of a fraudulent purpose or intent in making the contract. I do not mean, of course, that judges and juries are under no circumstances any longer aided by legal presumptions in deciding upon the existence of fraud. These circumstances, however, and the cases where presumptions are used, have been very much narrowed; and the issue of fraud, or no fraud, is generally determined in the same manner as any other issue of fact. This is certainly so in the case mentioned in the text. In order that inadequacy should be "conclusive evidence" of fraud, the amount of it must be fixed by some universal standard or criterion, and there is no pretense that this has ever been done. The proof of inadequacy is submitted to the jury or court and is treated like any other evidence. Fraud is not inferred from it by any presumption—for it is now admitted by all accurate thinkers that the expression "presumption of fact" is very misleading—and that it means nothing but the argumentative process by which, from the existence of one fact, the human judgment reaches the conclusion that another fact also exists.

from the treatment of inadequacy merely as a hardship, the courts have preferred to regard it as evidence of fraud. It may well be doubted, however, whether the difficulty has been at all lessened by the adoption of this method.(1)

SEC. 195. As inadequacy is not a hardship or an unfairness merely, but is only objectionable so far as it is satisfactory evidence of fraud, and as fraud being a mental condition of a party must exist, if at all, at the very inception of the agreement, it follows that the time to which the question of adequacy or inadequacy must be referred for decision, is always that of concluding the contract. If fraud can be fatal to a contract, it must necessarily have affected the transaction at the commencement. If, therefore, there was no inadequacy either in the price or in the subject-matter at the formation of the contract, none can arise from subsequent events or change of circumstances.(2) There is one exception to the general rule concerning

(1) In some systems of jurisprudence an arbitrary rule is adopted which furnishes a fixed standard by which to determine all individual cases of inadequacy. In the Roman law this standard was one-half the real value of the subject-matter when immovable property; if the price agreed was less than one-half the real value, the seller could compel the buyer to elect either to rescind, restore the thing, and take back the price, or to affirm and make up the deficiency. Code Lib. iv, tit. 44, 2. A like method forms part of the French law. Such rules, however, are plainly contrary to the entire spirit of our law, and to the judicial processes by which that law is administered.

(2) As for example, in a contract of which the consideration is wholly or partly an annuity to a certain person, to be paid during his life, and he dies perhaps before even the first payment, this does not render the consideration inadequate. *Mortimer v. Capper*, 1 Bro. C. C. 156. The same may be said of contracts of life insurance, when the assured dies, perhaps after the first payment of premium. These cases, however, are not fair illustrations, since in all such aleatory contracts, the whole agreement is expressly based upon the uncertainty in the happening of a specified event, the parties contracting intentionally with respect to such uncertainty, and the risk which it occasions. If the happening of the event sooner than was hoped, could invalidate such agreements, this would be tantamount to destroying the whole efficacy of such agreements. *Batty v. Lloyd*, 1 Vern. 141; *Hale v. Wilkinson*, 21 Gratt. 75; *Lee v. Kirby*, 104 Mass. 420. In the old case of *Savile v. Savile*, 1 P. Wms. 745, the consideration was held inadequate, because the values subsequently depreciated, but the doctrine of his case has long been overruled; but see *Willard v. Tayloe*, 8 Wall. 557, which was really a case of price becoming inadequate by means of subsequent events. If, however, the plaintiff, instead of being ready and prompt to obtain his remedy as soon as he was able, should unnecessarily delay, and only seek to enforce the contract when, after his laches or change of circumstances had rendered the price inadequate, a specific performance might, and generally would, be refused. *Whitaker v. Bond*, 63 N. C. 290; *McCarty v. Kyle*, 4 Coldw. 349; *Hudson v. King*, 2 Heisk. 561; *Booten v. Scheffer*, 21 Gratt. 474.

inadequacy—namely, contracts for the sale of expectancies and reversionary estates by heirs, etc., which, as has already been stated, will never be enforced against the vendor unless the price is clearly shown to be fully adequate, and in which the burden is upon the purchaser of proving such adequacy.(1)●

SEC. 196. *Coupled with other facts.*—Whenever the inadequacy in the price or in the subject-matter does not stand alone in the transaction, pure and simple, but is accompanied by other facts or conditions, or events, showing bad faith, such as acts of fraud, misrepresentations, concealments of the true value, or of other material features, ignorance, weakness of mind, undue advantage, oppression, and the like, this combination of objectionable and inadequate incidents may, and if clearly established by the proof, will, induce a court to deny the remedy of specific performance; and may even furnish a sufficient ground for the affirmative relief of rescission. In all such cases, however, the real gravamen of the objection, the determining reason for refusing to execute the agreement on the one hand, and for setting it aside on the other, is the *fraud* of the party who has used the wrongful means, and the inadequacy is only material with the other party, as evidence more or less cogent of such fraud.(2)

(1) *Playford v. Playford*, 4 Hare, 546. See *ante*, § 191; Story Eq. Jur. § 336 and notes.

(2) *Deane v. Rastron*, 1 Anst. 64, and *Fish v. Leser*, 69 Ill. 394 (concealment of the real value); *Young v. Clarke*, Prec. Ch. 538; *Lewis v. Lord Lechmere*, 10 Mod. 503, and *Fish v. Leser* (ignorance); *Blackwelder v. Loveless*, 21 Ala. 371 (undue advantage or oppression). In *Cockell v. Taylor*, 15 Beav. 103, 115, the plaintiff, who was illiterate and poor, was very anxious to make a loan, in order to be able to prosecute a claim to some very valuable property in the court of chancery, and the lender only granted the loan on condition that the plaintiff should make the contract in suit, which was an agreement to purchase land for a price ten times greater than its real value. The contract was set aside by Sir J. ROMILLY, M. R., who said: "Coupled with such circumstances, the evidence of an over-price is of great weight, and if the case had stood here I should have been of opinion that this transaction was one which could not stand." See, also, *Powers v. Hale*, 5 Post. (N. H.) 145; *Howard v. Edgell*, 17 Vt. 9; *Osgood v. Franklin*, 2 Johns. Ch. 24; *Modisett v. Johnson*, 2 Blackf. 431; *McCormick v. Malin*, 5 Blackf. 509; *Brooke v. Berry*, 2 Gill. 83; *Gasque v. Small*, 2 Strobb. Eq. 72; *Cabeen v. Gordon*, 1 Hill Eq. 51; *Bunch v. Hurst*, 3 Dessau. Eq. 273; *Harrison v. Town*, 17 Miss. 237; *Cathcart v. Robinson*, 5 Pet. 263; *Benton v. Shreeve*, 4 Ind. 66; *Byers v. Surget*, 19 How. (U. S.) 303. In *Clitherall v. Ogilvie*, 1 Dessau. Eq. 257, a contract between a quite young and entirely inexperienced man and a mature person, was refused performance; and in *Graham v. Pancoast*, 6 Casey, 89, the remedy was denied on account of the age of a party. In *Henderson v. Hays*, 2 Watts, 148, 151, the defendant's mind was weakened by habitual drink, and the court refused to enforce his

The nominal character of the consideration, or the inadequacy of the price in any respect, may also, in connection with other facts, tend to show that the transfer was not a sale but a gift, and thus prevent a specific performance, since equity does not enforce a gift of real estate unless the donee has executed it on his part by taking possession and making improvements.(1)

SEC. 197. When the inadequacy appears in a contract between a parent and child, or between other parties so related, that the "good" consideration of love and affection would be added to the "valuable" consideration, this circumstance is not, according to some decisions, to be regarded as affecting the right to a specific performance; all suspicion or inference of fraud or hardship is removed by the fact of the relationship.(2) It is certainly curious that this very circumstance has seemed to other courts to furnish a ground for grave suspicion, and to raise a presumption against the good faith of the transaction. It has thus been held that inadequacy of consideration in a contract of sale between near relatives, especially where one is in a position of natural superiority and command over the other—as a father and son—raise a presumption of undue influence, which, in connection with the inadequacy, may defeat a specific performance, or even avoid the agreement.(3)

contract for the sale of his farm, *since the price would in all probability be soon squandered in drink.* *Campbell v. Spencer*, 2 Binney, 133, was a somewhat similar case, with a like decision.

(1) *Callaghan v. Callaghan*, 8 Cl. & Fin. 374. See, as to the specific performance of gifts, *ante*, § 130.

(2) *Shepherd v. Bevin*, 9 Gill, 32, 39; 4 Md. Ch. 133; *Haines v. Haines*, 6 Md. 435; *White v. Thompson*, 1 Dev. & Bat. Eq. 493; *Fripp v. Fripp*, 1 Rice Eq. 84. In *Shepherd v. Bevin*, this view was stated by FRICK, J., as follows: "The agreement is not between strangers, but the parties are mother and son, in the closest relation of life. The contract has the meritorious consideration of love and affection, superadded to the valuable consideration which passed between them. Could the appellant reasonably have declined the proposition to release the amount of his claim against the mother, when coming from herself? And as her own proposition to her child, of what weight is the objection on the score of the inadequacy of the price proposed and accepted by herself? No small part of the consideration, besides, acting upon her motives, was the desire to gratify the last expressed wishes of her deceased husband. And in an agreement made by a parent with a child, a slight consideration will be sufficient to support it. 4 Har. & McH. 258. The case of *Hays v. Hollis*, 8 Gill, 357, decided at the present term of this court, is, upon this point, precisely parallel, and obviates all further remarks upon the objection to the adequacy of the consideration."

(3) *Whelan v. Whelan*, 3 Cow. 537. Such a contract has also been regarded as coming within the principle established with respect to voluntary agreements, and as, for that reason, not enforceable in equity. *Callaghan v. Callaghan*, 8 Cl. & Fin. 374.

## SECTION XI.

*The title must be free from reasonable doubt.*

SECTION 198. There remains one more feature to be considered of those which, in the ordinary language of the books, merely influence the discretion of the court, but do not affect the substance or legal efficacy of the agreement. It is the rule that in suits by a vendor the purchaser will not be forced to complete the contract unless the title is free from any reasonable doubt. This requirement should be carefully distinguished from the objection that, as a matter of fact established by the proofs, the vendor has no title at all, or has only a partial or a defective one—an objection which may be raised by either of the parties, and which, if well founded, will, as a matter of law, either totally defeat a specific performance, or render its enforcement partial, and, perhaps, accompanied by a compensation. The rule now to be discussed differs in every respect from this. It assumes that the question whether the vendor's title is valid or imperfect, is not definitely passed upon by the court. If, however, there arises, either on the face of the pleadings, or from the examination made during the progress of the suit, a reasonable doubt concerning the title to be made and given by the vendor, the court, without deciding the question between the parties then before it—which decision might not be binding upon third persons, and, therefore, might not prevent the same question from being subsequently raised by other claimants of the land—regards the existence of this doubt as a sufficient reason for not compelling the purchaser to carry out the agreement and accept a conveyance.(1) In treating of the subject I shall, after some pre-

(1) *Pyrke v. Waddingham*, 10 Hare, 1; *Lucas v. James*, 7 Hare, 418, 425; *Radford v. Willis*, L. R. 7 Ch. 7; *Alexander v. Mills*, L. R. 6 Ch. 124; *Beioley v. Carter*, L. R. 4 Ch. 230; *Collier v. McBean*, L. R. 1 Ch. 81; *Mullings v. Trinder*, L. R. 10 Eq. 449; *Cook v. Dawson*, 3 DeG. F. & J. 127; 29 Beav. 123; *Rede v. Oakes*, 4 DeG. J. & S. 505; 32 Beav. 555; *Rogers v. Waterhouse*, 4 Drew. 329; *Bull v. Hutchens*, 32 Beav. 615; *Collard v. Sampson*, 16 Beav. 543; 4 DeG. M. & G. 224; *Freer v. Hesse*, 4 DeG. M. & G. 495; *Falkner v. Equitable, etc., Society*, 4 Drew. 352; *Sheppard v. Doolan*, 3 D. & War. 1, 8; *Seymour v. Delancey*, 1 Hop. 496; *Bates v. Delevan*, 5 Paige, 299; *Owings v. Baldwin*, 8 Gill, 337; *Butler v. O'Hear*, 1 Dessau. Eq. 382; *Fitzpatrick v. Featherstone*, 3 Ala. 40; *Morgan v. Morgan*, 2 Wheat. 290; *Longworth v. Taylor*, 1 McLean, 395; *Watts v. Waddle*, 1 McLean, 200; *Jeffries v. Jeffries*, 117 Mass. 184; *Taylor v. Williams*, 45 Mo. 80; *Powell v. Conant*, 33 Mich. 396; *Pratt v. Eby*, 67 Pa. St. 396; *Walsh v. Hall*, 66 N. C. 233; *Vreeland v. Blauvelt*, 23 N. J. Eq. 483; *Allen v. Atkinson*, 21 Mich.



liminary matter, discuss: 1, the cases in which the title may be too doubtful; and 2, the nature and extent of the doubt itself.

SEC. 199. In the earlier cases before the English court of chancery, nothing was known of doubtful titles as a special class; if objection was raised in any suit, the court passed definitely upon the validity of the title, granting or refusing the relief according to conclusion thus reached.(1) The notion that a specific performance should be denied when the vendor's title is merely doubtful, without it being necessary for the court to pronounce it bad, was first introduced by Sir JOSEPH JEKYLL and Lord THURLOW, and has since become the acknowledged doctrine both in England and in the United States.(2) As will be seen, however, in the following paragraphs, the very latest English decisions in applying the doctrine, exhibit a strong tendency towards the early practice.

SEC. 200. The doubt which can arise concerning any title, must, of necessity, relate either to the law or to the facts of the case. If the law is the object of the doubt, it may either be the law of the land proper—the municipal law; (3) or it may be confined to the construction of some deeds, wills, and other writings which constitute the chain of title.(4) The latest English cases seem inclined to confine a doubt in the law to the latter of these two subdivisions, and to hold that all doubts arising solely from the general law of the land must be solved by judicial decision.(5) If the doubt concerns the facts, these facts may either be elements of the title, as deaths, births, and the like, or they be outside of or collateral to the title.(6) In either of the two latter subdivisions, the facts may be susceptible of proof, and the doubt itself result from a want of satisfactory proof; (7) or they may be such as are, from their nature, incapable of definite

351; *Dobbs v. Norcross*, 24 N. J. Eq. 327; *Lesley v. Morris*, 9 Phila. 110; *Kostenbader v. Spotts*, 80 Pa. St. 430; *Sturtevant v. Jaques*, 14 Allen 523; *Young v. Rathbone*, 1 C. E. Green, 224.

(1) See 1 Bro. C. C. 76, n.

(2) *Marlow v. Smith*, 2 P. Wms. 198, per Sir J. JEKYLL; *Shapland v. Smith*, 1 Bro. C. C. 75, per Lord THURLOW. See, also, *Sloper v. Fish*, 2 V. & B. 149, per Sir WM. GRANT; *Cooper v. Denne*, 4 Bro. C. C. 80; 1 Ves. 565; *Sheffield v. Lord Mulgrave*, 2 Ves. 526; *Roake v. Kidd*, 5 Ves. 647; *Willcox v. Bellaers*, T. & R. 491, and see cases in last note but one.

(3) *Sloper v. Fish*, 2 V. & B. 145; *Blosse v. Lord Clanmorris*, 3 Bli. 62.

(4) *Lincoln v. Arcedeckne*, 1 Coll. C. C. 38; *Bristow v. Wood*, 1 Coll. C. C. 480; *Pyrke v. Waddingham*, 10 Hare, 1, 9, per TURNER, V. C.

(5) See *post*, § 202.

(6) Cases above cited in last note but one.

(7) *Smith v. Death*, 5 Mad. 371.

proof.(1) It is very plain that a doubt arising from certain of these sources is a much more serious objection, and, therefore, much more likely to prevail than a doubt arising from any of the others. For example, a doubt concerning the construction of instruments is less easy of solution than one depending upon a rule of the general law; while a doubt involving matters of fact incapable of positive proof, is much more prejudicial to a title than one caused by the deficient evidence of facts which may be proved.

SEC. 201. *I. Cases in which the title is too doubtful.*—As every title must, to a very great extent, depend upon its own facts and circumstances, it is plainly impossible to lay down any general proposition as a test by which all cases of a sufficient doubt may be discriminated and arranged. The most that can be done is to describe the particular typical cases in which the doubt has prevailed, with such amount of generalization and classification as can be gathered from the discordant opinions and dicta of the judges.(2) It has been suggested as a universal test, in England, that the title should be technically “marketable,” so that if the title offered to the purchaser is not a “marketable” one, and he has not expressly stipulated to accept anything less, it should not be forced upon him.(3) But a marketable

(1) *Lowes v. Lush*, 14 Ves. 547.

(2) As an illustration of the difficulty and of the judicial endeavors towards a solution, it has even been gravely suggested as the test of a controverted title, that the judge himself who is deciding the cause would be willing to lend his money upon the security of it!! In *Jervoise v. Duke of Northumberland*, 1 J. & W. 569, Lord ELDON said: “The court has almost gone to the length of saying that unless it is so confident that, if it had £95,000 to lay out on such an occasion, it would not hesitate to trust its own money on the title, it would not compel a purchaser to take it.” See, also, *Pyrke v. Waddingham*, 10 Hare, 9, per TURNER, V. C.; *Sheffield v. Lord Mulgrave*, 2 Ves. 526. The impracticability and even absurdity of this test are apparent.

(3) *Lord Braybroke v. Inskip*, 8 Ves. 428, per Lord ELDON. It is undoubtedly the settled rule in the United States, that, in the absence of any stipulation to the contrary, the purchaser is entitled to have “a marketable title.” The meaning of this term, however, is somewhat different, as used by our courts, from the special and technical sense which seems to be given to it in England. By “a marketable title” the American courts evidently understand what the plain and ordinary meaning of the words implies, a title which would render the property salable at any time in the market—salable, that is, without any impediment or difficulty connected with the title itself. A “marketable title” is therefore one which is clear and good on the record, and without incumbrance. Of course, particular incumbrances, such as mortgages, judgments, easements, or dower, may be expressly provided for in the contract, while the title itself is otherwise clear upon the record, and in conformity with the requirements of the rule. That the purchaser, in the absence of stipulations to the contrary, cannot

title, as defined by one of the ablest English equity judges, is "one which, so far as its antecedents are concerned, may, at all times and under all circumstances, be forced on an unwilling purchaser." (1) The proposed test would, therefore, come to this: "a purchaser shall not be compelled to accept a title unless it be one which a purchaser can always be compelled to accept"—which, as a practical rule, certainly does not make the matter any the less difficult. (2)

SEC. 202. It has sometimes happened that the judge before whom a case was pending, entertained an opinion, even quite a decided opinion, in favor of the title, and yet, because an opinion unfavorable to its validity has been expressed, or is known to be held by some other person of authority, or person whose legal knowledge and ability entitle his conclusions upon any question to great respect, this fact has been held to throw a reasonable doubt upon the title, and to be a sufficient ground for denying to the vendor the remedy of specific

be forced to accept a title unless it is marketable, see the following cases among others: *Taylor v. Williams*, 45 Mo. 80; *Powell v. Conant*, 33 Mich. 396; *Pratt v. Eby*, 67 Pa. St. 396; *Vreeland v. Blauvelt*, 23 L. J. Eq. 483; *Allen v. Atkinson*, 21 Mich. 351; *Lesley v. Morris*, 9 Phila. 110; *Swain v. Fidelity Ins. Co.*, 54 Pa. St. 455; *Freetly v. Barnhart*, 51 Pa. St. 279; *Linkous v. Cooper*, 2 W. Va. 67; *Littlefield v. Tinseley*, 26 Tex. 353. From the simplicity of our real estate law and our methods of conveyancing, and especially from our system of registering, which prevails in every State, the requirements concerning "doubtful titles," which have been found necessary in England, do not and cannot exist in the United States. It would be no exaggeration to say that it is almost impossible for a case to arise in this country of doubtful title, where the doubt itself shall depend upon some rule of the general real estate law as yet uncertain, and which a decision of the court could settle and determine for all litigants, and all other controversies presenting the same question of law. The doubts with us must, from necessity, be those involving some matter of pure fact, or those turning upon the construction of some instrument, as a will or a deed, through which the title is deduced. The great majority of cases will be found, I think, to belong to the former of these classes. The doubt arises from some matter of fact, such as the existence of an outstanding incumbrance, or dower right, and the like. In either of these classes of doubtful titles it is plain—and this rule is conceded by the English courts—that a decision in a suit between the vendor and the vendee cannot settle the question and remove the doubt finally. For this reason the American courts, in case of a doubtful title, cannot adopt the recent doctrine of the English judges, which is only applicable to cases where the doubt arises from an unsettled rule of the general law.

(1) *Pyrke v. Waddingham*, 10 Hare, 8, per TURNER, V. C.

(2) Owing to the practices of land owners and the enormously complicated condition of titles and methods of conveyancing in England, the term "marketable title" has acquired there a technical meaning, which does not really exist in this country. It would appear that a comparatively few titles are strictly "marketable"—at least, of those which come before the court of chancery, and figure in the reported decisions.

performance.(1) This, however, cannot be said to be a rule, and it is contrary to the practice and tendency of the latest English cases.(2) It has, however, been laid down as a definite rule, that a sufficient doubt is always created if another court has rendered a decision hostile to the title, although the court before which the matter is then pending may dissent from that decision; the rule has even been stated, and there is judicial authority in its support, that if a lower court has pronounced a title bad, and the case is then carried to an appellate tribunal, which takes a different view and holds the title good, this latter opinion will, nevertheless, not be acted upon; the adverse conclusion of the inferior court will, of itself, create the fatal doubt.(3) This rule has been expressly repudiated in England by the latest cases, and the more reasonable doctrine has been there established, that the decision of the court before which a suit is pending in favor of the vendor's title shall remove every doubt which, from any cause, might have before existed, and shall, so far as this objection goes, render a specific enforcement of the contract necessary.(4) The adop-

(1) In *Price v. Strange*, 6 Mad. 159, 164, Sir JOHN LEACH expressed a decided opinion in favor of the title then before him, and still denied to enforce it upon the purchaser. In *Pyrke v. Waddinghim*, 10 Hare, 8, V. C. TURNER discussed the whole subject in a most exhaustive manner, gave his own opinion in favor of the title, and refused to grant a specific performance.

(2) In *Hamilton v. Buckmaster*, L. R. 3 Eq. 323, per PAGE WOOD, V. C., the title was pronounced good. Mr. DART, the celebrated real estate lawyer, and one of the "conveyancing counsel" to the court, had given an opinion to the vendee that the title was bad. *Held*, that this opinion, from such a counsel, did not render the title doubtful so as to lead the court, against its own view of the law, to refuse a specific performance.

(3) *Rose v. Calland*, 5 Ves. 186.

(4) *Alexander v. Mills*, L. R. 6 Ch. 124, 131, per JAMES, L. J.: "He (the M. R.) disposes first of an objection which has been pressed upon us, as follows: 'I do not adopt the expression, frequently cited to me, that the court will abstain from compelling a defendant to accept a title where, though the point is doubtful, the court is of opinion that the objection is bad.' We do not say that there may not be cases in which a question of law may be considered so doubtful that a court would not, on its own view, compel a purchaser to take a title. Still, as a general, almost universal, rule, the court is bound as much between vendor and purchaser, as in any other case, to ascertain and determine, as it best may, what the law is, and to take that to be the law which it has so ascertained and determined. The exceptions to this will probably be found to consist, not in pure questions of legal principle, but in cases where the difficulty and the doubt arise in ascertaining the true construction and legal operation of some ill-expressed and inartificial instrument. This case involves a question of general law, applicable to all similar settlements, and we are bound to say, one way or the other, what that law is; and we cannot, in such a case, escape from that duty by saying that the decision of the M. R., in taking one view, makes the other view, if held by us, so

tion of this doctrine does not destroy all the effects of a reasonable doubt, since it still leaves open all the cases in which the court does not or will not pass upon the question of title. An appellate court may think that a doubt inhering in the case has been so much

doubtful that we cannot force it on a purchaser. The contrary was expressly laid down by our predecessors in the case of *Beioley v. Carter*, L. R. 4 Ch. 230, adopting the language of Lord St. LEONARDS in the case of *Shepard v. Doolan*, 3 Dr. & War. 1, 8, there cited." In *Beioley v. Carter*, L. R. 4 Ch. 230, the general doctrine was announced, that a vendee will be forced to take a title which appears to the appellate court to be good, although the court below was of a different opinion—that fact not creating a doubtful title—per SELWYN, L. J., p. 236, and GIFFARD, L. J., p. 240, quoting *Collier v. McBean*, L. R. 1 Ch. 81, and *Shepard v. Doolan*, *supra*. *Bell v. Holtby*, L. R. 15 Eq. 178, holds, per MALINS, V. C., that where a doubt arises upon the validity of a title, the decision of the court removes the doubt, and specific performance will be enforced. To the same effect, see *Wrigley v. Sykes*, 21 Beav. 337; *Mullings v. Trinder*, L. R. 10 Eq. 449, per Lord ROMILLY, M. R.; *Radford v. Willis*, L. R. 7 Ch. 7. This rule, as established in England by the latest authorities, has not been followed by some, at least, of the recent American cases. Thus in *Pratt v. Ely*, 67 Pa. St. 396, it was held that a doubtful title cannot be made marketable, and thus forced upon the vendee, by a decision in its favor in an action between himself and the vendor; and in *Vreeland v. Blauvelt*, 23 N. J. Eq. 483, it was held, that if there is such a doubt concerning the title as would affect its marketable value, it will not be forced on the purchaser, although the court before which the suit for a specific performance is pending might consider it to be good. Which of these two rules is to be preferred, as based upon principle, cannot be determined in an absolute manner, since the propriety of applying either must depend upon the nature and origin of the doubt. If the doubt results from a rule or doctrine of the general law concerning real property, the decision of the court announcing the rule, or settling the doctrine, and thus clearing up the doubt, will, of course, be binding in all subsequent cases, whether between the same or other parties; for it is not to be supposed that the court would lay down one rule of law for one set of parties, and a different rule for other parties. The reasoning, therefore, that the decision of the court in the suit between the vendor and vendee would not be binding in a subsequent case between the vendee and other claimants is without any foundation, where that decision turns upon the settlement of a legal rule. Undoubtedly the former judgment is not technically binding as *res adjudicata*, but the law once formally announced is the law for all litigant parties. If, however, the doubt does not inhere in some disputed legal rule, but in *matters of fact* connected with the deduction of title, so that no doctrine or rule of law is established by the decision, then it is clear that the decision in favor of the title in the case pending between the vendor and vendee, cannot be of any avail to the vendee in a subsequent action brought against himself by other claimants of the land; and, therefore, such decision would not put the doubt as to the title at rest. This plain distinction between the two species of doubts, has, I think, been sometimes overlooked by the courts in their general statements of the rules concerning doubtful titles. That the latest English rule is not suited to the vast majority of cases of doubtful title in the United States, since they involve questions of fact or of construction rather than those of the general law, see the observations in a note under § 201, *ante*.

strengthened by an adverse decision of the inferior judge, that it will not definitely pass upon the title, but simply refuse to force it upon the purchaser.(1) This latest doctrine of the English courts is not, in my opinion, applicable to the cases of doubtful title which ordinarily arise in the United States.

SEC. 203. One rule belonging to this branch of the subject is firmly established both in England and in the United States. A specific performance will never be decreed at the suit of the vendor whenever the doubt concerning his title is one which can only be settled by further litigation, or when the court can see that the purchaser will, with reasonable probability, be exposed to *bona fide* adverse claims on the part of third persons, and to the risk of litigation for the purpose of enforcing such claims. The reason of this rule is as obvious as the rule itself is just. The present decree binds only the parties to the suit, and constitutes no bar nor even obstacle to proceedings by those who assert a right in conflict with the title which the vendor purports to hold and to transfer.(2) This liability to a future controversy may arise from various causes. Among the most frequent is the difficulty of construing written instruments which form a part of the title, where the doubt arises upon some ill-drawn in artificial writing upon which the vendor's title partly or wholly depends. In such a case the doubt, if it is reasonably well founded, must necessarily prevail and prevent an execution of the contract.(3) Another frequent cause consists in events or acts collateral

(1) As in *Collier v. McBean*, L. R. 1 Ch. 81, the title was not forced on the vendee, since the M. R. had pronounced it bad; the appellate court not passing upon it, although one of the Ld. JJ. thought it good.

(2) In language often repeated by the courts, both in this country and in England, a vendee "will not be compelled to buy a law suit." *Price v. Strange*, 6 Mad. 159, 165; *Sharp v. Adcock*, 4 Russ. 374; *Butler v. O'Hear*, 1 Dessau. Eq. 382; *Parkin v. Thorold*, 16 Beav. 67, per ROMILLY, M. R.; *Rogers v. Waterhouse*, 4 Drew. 329; *Dowson v. Solomon*, 1 Dr. & Sm. 1; *Collier v. McBean*, 14 W. R. 156; *Pegler v. White*, 33 Beav. 403; *Jeffries v. Jeffries*, 117 Mass. 184; *Dobbs v. Norcross*, 24 N. J. Eq. 327.

(3) As to the doubt arising from the construction of writings, see *Alexander v. Mills*, L. R. 6 Ch. 124. An illustration of this class of doubts is seen in *Cook v. Dawson*, 8 DeG. F. & J. 127, where the question was, whether the executrix, under a will, could sell the real estate in payment of debts, the land in controversy having been thus sold. This question depended upon another—whether the testator had in his will "charged the fee simple with the payment of his debts." The doubt arose, therefore, wholly in respect to this question of construction. KNIGHT BRUCE, L. J., said (p. 129): "Did the will do so? This question of construction appears to me one of difficulty and doubt; of difficulty too great, and doubt too serious, to render the title one fit to be forced on a purchaser." TURNER, L. J., said (p. 130): "One judge of the court (the M. R., whose decision was

to the title, but capable of destroying its validity, the legal nature and effects of which can only be ascertained by another and different judicial proceeding.(1)

SEC. 204. II. *The nature and extent of the doubt itself.*—Whatever be the cause from which the doubt arises, whether from an unsettled principle of the general law, or from the difficulty of construing instruments, or from past facts and events, it must be something more than a mere speculation, theory or possibility. A court of justice, in all its investigations, deals with arguments more or less based upon a balance of probabilities; and in rendering its decisions must be satisfied if it reaches a conclusion which is morally certain. To admit of objections which were purely speculative, or mere possibilities, would destroy the practical efficacy of all judicial proceedings. A doubt covering the vendor's title, therefore, which can avail to defeat his remedy of specific performance, must be reasonable, and so far as it

appealed from) has pronounced the title bad. If we were to declare it good, our decision would not be binding on adverse claimants; and if a suit should be instituted to impeach the purchaser's title, a future court of appeal might differ from us in opinion. 'The cause ought, therefore, to be clear to demonstration before we interfere with the order relieving the purchaser.' For a case of doubtful title arising on the construction of a will, see *Schier v. Williams*, 1 Curtis C. C. 479.

(1) As an example of such events or acts is a breach of trust committed by some party which would render the title impeachable at the suit of the *cestuis que trustent*, *Rede v. Oakes*, 4 De G. J. & S. 505, is a case. Land had been sold by vendors, some of whom were trustees, and the question was whether this contract of sale was a breach of trust, so that the *cestuis que trustent* might attack the conveyance. On account of the doubt thus cast upon the title, the purchaser refused to complete. The M. R. had held the title good and decreed a specific performance. Per Knight Bruce, L. J., p. 512: "The doctrine applicable to cases of specific performance, is, in my judgment, opposed to granting a specific performance in this case; for if it is not clear that the contract (of sale) was a breach of trust on the part of each set of trustees, it must be held, I, think, to be at least reasonably and seriously doubtful whether it was not so." Per Turner, L. J., p. 513: "The true question on which the validity of such a sale must depend, seems to me to be this: Was or was not the sale made under such circumstances and in such a manner as that *cestuis que trustent* ought to be held bound by it? If it was, the title of the purchaser could not, I apprehend, be impeached. If it was not, his title would, I apprehend, be liable to impeachment at the suit of the *cestuis que trustent*." He goes on to examine the contract, the particulars and conditions of the sale, and the circumstances under which it was made, and concludes thus, p. 515: "I cannot but think that it is at least doubtful whether *cestuis que trustent* can be bound by a rule made by their trustees under such circumstances. I go no further than to say that is doubtful; for if there be a doubt, it cannot, in my opinion, be thrown upon the purchaser to contest that doubt."

depends upon contingent events and uncertain facts, their occurrence or existence must be fairly probable.(1)

SEC. 205. In England, much oftener than in the United States, titles may sometimes depend for their validity upon presumptions in reference to some collateral acts, facts, or events which perhaps are incapable of proof by direct evidence, and the rule seems to be settled that a title sustained by such a presumption will be held free from doubt, and forced upon the vendee, whenever the circumstances of the case are such that, had it been pending before a jury, the judge would have directed them peremptorily to find the fact in accordance with the presumption; but the title will be held too doubtful to be forced on the vendee, whenever the circumstances would have been submitted to the jury for them to find either in conformity with or against the presumption.(2) Whenever a doubt concerning the title arises from facts which are not conclusively proved, and is not aided by any clear presumption, it will generally prevail and prevent a specific performance.(3)

(1) In *Lyddal v. Weston*, 2 Atk. 20, Lord HARDWICKE said: "The court must govern itself by a moral certainty, for it is impossible in the nature of things there should be a mathematical certainty of a good title." And it being objected that there was a reservation of mines which made the title defective, he yet enforced the contract because he was satisfied that there was no probability of the reservation becoming operative, since either there were no mines, or that all legal right to act under it has ceased. See *Seaman v. Vawdrey*, 16 Ves. 393, per Sir WM. GRANT; *Martin v. Cotter*, 3 J. & Lat. 496, and in *Cattell v. Corral*, 4 Y. & C. Ex. 237, ALDERSON, B., said, in regard to a doubt from fear of future litigation, there "must be a reasonable decent probability of litigation." In *Spencer v. Topham*, 22 Beav. 573, the title depended upon the validity of a former purchase by a solicitor from his client, and it was objected that it was doubtful; but proof was given that the sale by the client to the attorney was valid, although given without the presence and testimony of the client; and it being still objected that the client might be able to produce other evidence impeaching the transaction and thus invalidating it, the M. R., Sir J. ROMILLY, considered that this was a mere speculative possibility, and not ground for a reasonable doubt. In support of the rule stated in the text see, also, *Vreeland v. Blauvelt*, 23 N. J. Eq. 483; *Kostenbader v. Spotts*, 80 Pa. St. 430.

(2) *Emery v. Grocock*, 6 Mad. 54; *Barnwell v. Harris*, 1 Taunt. 430. In *Causton v. Macklew*, 2 Sim. 242, the validity of the title depended upon the fact of no execution on certain judgments having been issued between two dates, about eight months apart. Nothing having been proved to have happened or to have been done which could be referred to such execution, it was presumed that the execution was not issued, and the title was accordingly held good. For presumptions arising from recitals in deeds and long possession, see *Prosser v. Watts*, 6 Mad. 59; *Magennis v. Fallon*, 2 Moll. 561.

(3) As examples: a title depended for its validity upon the fact that there was no creditor who could take advantage of an act of bankruptcy committed by the vendor; there being no proof of such fact, and there being no presumption, the



SEC. 206. Intimately connected with the general subject of doubt arising from extrinsic facts, with or without the help of presumptions, is the rule, well settled in England, that a person who has made a prior voluntary settlement, cannot force upon a purchaser a title depending for its validity upon the fact that such settlement is void, because there is no presumption "that there may not have been some intermediate acts, which by matter *ex post facto*, may have made the settlement good which in its origin was not good." (1) But on the other hand, if the validity of a title depends upon the fact that a certain prior voluntary conveyance of the land has been rendered void against the purchaser by a subsequent purchase for a valuable consideration and without notice, it will be presumed, in the absence of evidence to the contrary, that the voluntary conveyance had not been made valid by any subsequent acts, and so the title will be pronounced free from doubt and forced upon a vendee. (2) The reason for this distinction is evident. In the latter case a presumption is made to sustain a subsequent conveyance for value and without notice, which has actually been executed, and by operation of law has destroyed the prior voluntary conveyance, unless some intervening facts had made the prior conveyance valid; the court does not presume that there were such facts. In the former case, a party is attempting to overthrow a voluntary conveyance which he himself had made, and which possibly may have become valid, and the court will aid him by no presumption that it has not been thus validated.

SEC. 207. Where the vendor's title is objected to on the ground that it is prejudicially affected by actual fraud in some prior conveyances or transactions from and through which it is and must be derived, no very general or definite rule is possible, and each case must depend, to a great extent, upon its own circumstances. The fraud must, of course, inhere in extrinsic facts, which will not appear on the face of the title deeds, an abstract of which is examined by the purchaser, and which will, in general, be unknown to him, and often impos-

doubt prevailed, *Lowes v. Lush*, 14 Ves. 547;—the validity of a title depended upon the absence of notice of an incumbrance, *Freer v. Hesse*, 4 DeG. M. & G. 495;—where it depended upon mere possession and the presumption arising therefrom, *Eyton v. Dicker*, 4 Pri. 303.

(1) Lord Eldon, in *Johnson v. Legard*, T. & R. 294; *Smith v. Garland*, 2 Mervi. 123.

(2) In such cases the title in suit would, of course, be derived from the subsequent conveyance for a valuable consideration, by which the prior voluntary conveyance was invalidated. *Butlerfield v. Heath*, 15 Beav. 408; *Bucklo v. Mitchell*, 18 Ves. 100.

sible or, at least, difficult for him to ascertain. If, therefore, there are any circumstances sufficient to throw an apparently well-founded suspicion upon the title, it would appear that no presumption should be admitted in its support; but such a conclusion, however reasonable, is not warranted by all the decided cases, some of which have allowed a presumption of good faith to overcome the objection, remove the doubt and render the title one to be forced on a purchaser.(1)

SEC. 208. Under the former English law in reference to the probate of wills, no sufficient doubt of the validity of a vendor's title derived under a will could arise from the mere fact that the will had not been

(1) The cases are somewhat conflicting, but the tendency is in favor of a presumption of good faith where the circumstances go no farther than to raise a suspicion of fraud. In *Hartley v. Smith*, *Buck's Bank's Cases*, 368, 380, Sir JOHN LEACH, M. R., laid down a rule which would cut off all presumption of good faith. The title depended upon a grant of chattels which contained a provision for the grantor's continuing in possession in a certain contingency. Under the law as to transfer of chattels by assignors remaining in possession, this assignment might be void. Without deciding that question the court held that as the transfer might be void, and as it was fraudulent and void unless made *bona fide* and for a valuable consideration, and as this depended upon facts beyond the purchaser's power of readily ascertaining, the title was too doubtful to be forced upon him. He said: "My opinion therefore is, that a court of equity ought not to compel this purchaser to accept this title; because, assuming the deed not to be fraudulent on its face, it still may be avoided by circumstances extrinsic, which it is neither in the power of the purchaser nor of this court to reach." See, also, *Boswell v. Mendham*, 6 Mad. 373. The rule thus broadly stated, and which cuts off any presumption of good faith in all cases where there is a suspicion of fraud arising from prior external facts, has not been adopted in subsequent cases which have admitted such a presumption. In *Cattell v. Corral*, 4 Y. & C. Ex. 228, 236, ALDERSON, B., said of Sir J. LEACH's opinion, that it "must not be pushed to the farthest extent which the words will possibly bear;" and he held a title free from sufficient doubt, which was made upon a deed which might have been shown by extrinsic evidence to be fraudulent and void as against creditors,—sustaining it because there was no sufficient evidence from which to infer such an invalid character—in other words, a presumption of good faith was admitted. In *Green v. Pulsford*, 2 Beav. 71, the vendor's title was derived from an appointment made by a husband and wife who held by virtue of a settlement on themselves and their children, with power to appoint. There were circumstances on the face of the papers raising a suspicion that the appointment was a fraud upon the settlement and the rights of the children under it, and one of the children had actually notified the purchaser not to complete because the appointment was a fraud. But as this notice stated no facts, and gave no information in addition to what appeared on the title papers, and as it had been followed by no proceedings on the part of the children, the court held that the doubt was not sufficient to prevent a specific performance. For analogous cases see *McQueen v. Farquhar*, 11 Ves. 467; *Grove v. Bastard*, 2 Phill. 619; 1 DeG. M. & G. 69. On the other hand, for a case where the court refused to presume the existence of special facts necessary to make a title valid, see *Blacklow v. Laws*, 2 Hare, 40.

proved against the heir or that he did not join in the conveyance.(1) Whether the same rule should prevail in the American States, where the statutes provide for the proof of wills of real estate, and where such proof is a matter of universal practice, or even in England since the recent legislation upon the subject of probate, may, I think, be at least questionable. In this country the omission to prove a will of land would be a very unusual circumstance, and would certainly render a title made under it very suspicious to an ordinary buyer, and, unless the will was an ancient one, would certainly prevent a savings bank or other similar institution from accepting the title as a valid security for a loan. In deciding upon cases of doubtful title, and in forcing them upon a purchaser, courts of equity should and undoubtedly do pay a great respect to the views and habits of business men

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### THIRD GROUP.

*Incidents and features of the contract connected with or growing out of the conduct—generally preliminary—of the parties, which involve the validity of the contract and may render it voidable, and which, therefore, as a matter of strict right, affect the equitable remedy.*

### SECTION XII.

*The contract must be free from misrepresentation.*

SECTION 209. The incidents and features which form this third group generally spring from the conduct of the parties during the negotiation, or at the time of concluding the agreement, and are, therefore, to a great extent, rather collateral or preliminary to the contract than forming a part of its substance. This is not, however, universally the case, for some of them, as, for example, illegality, inhere in the very subject-matter or in the stipulations. Their most important characteristic, which distinguishes them from the incidents composing the preceding group, is their direct effect upon the validity

(1) *Colton v. Wilson*, 3 P. Wms. 190; *Morrison v. Arnold*, 19 Ves. 670, per Lord ELDON; *Weddall v. Nixon*, 17 Beav. 160; *McCulloch v. Gregory*, 3 K. & J. 12. In the latter case, the vendor's title was derived from a certain will,—the validity of which, during a long litigation (of 13 years) had not been questioned—and a third person claiming under another will had withdrawn his claim and abandoned all contest, the title was held to be free from doubt and was forced on the vendee.

of the agreement itself. If any one of these features exists in its full measure the contract is thereby rendered voidable, both in law and in equity; a complete defense exists to an action at law brought upon it, and a ground is furnished for a suit in equity to rescind it. The presense of these incidents and features, therefore, prevents a court from granting the equitable remedy of specific performance, not in any view of the subject as a matter of discretion, but as a matter of absolute right, since there really is no valid contract which may be enforced. It is true that some of these incidents—misrepresentation and concealment—may avail to defeat a specific execution of an agreement, although they may not possess the elements of fraud to such an extent that the agreement would be rescinded; but when the misrepresentation, concealment, fraud, illegality, mistake, and the like, are fully shown, and the contract is thereby made voidable, the defense to a suit for specific performance is absolute, and in no sense discretionary. The incident which forms the subject-matter of the present section is “misrepresentation.”

SEC. 210. Although misrepresentations are more frequently made by the vendors in contracts for the sale or transfer of property, real or personal, they may be made by either of the parties in any species of agreement, and the treatment of the subject must be so general as to cover all of these cases. The general doctrine is elementary, that a misrepresentation relating to and connected with a contract, is a ground for denying a specific performance when demanded by the party to the agreement who made it, and may be a sufficient ground for granting the relief of rescision in favor of the contracting party to whom it was made.(1) The general rule is familiar, and the discus-

(1) *Edwards v. McLeay*, Coop. 308; 5 Sw. 287; *Gibson v. D'Este*, 2 Y. & C. C. 542; *Wilde v. Gibson*, 1 H. L. Cas. 605; *Juzan v. Toulmin*, 9 Ala. 662; *Warner v. Daniels*, 1 W. & M. 90; *Taylor v. Fleet*, 1 Barb. 471; *Best v. Stow*, 2 Sandf. Ch. 298; *Morrison v. Lods*, 39 Cal. 381; *Wells v. Millett*, 23 Wisc. 64; *Holmes' Appeal*, 77 Pa. St. 50; *Law v. Grant*, 37 Wisc. 548; *Swimm v. Bush*, 23 Mich. 99; *Hickey v. Drake*, 47 Mo. 369; *Gunby v. Sluter*, 64 Md. 237; *Davis v. Synonds*, 1 Cox, 407; *Reynell v. Sprye*, 8 Hare, 222; 1 DeG. M. & G. 660; *Lord Brooke v. Rounthwaite*, 5 Hare, 298; *Brealey v. Collins*, Younge, 317; *Lowndes v. Lane*, 2 Cox, 363; *Stewart v. Alliston*, 1 Meriv. 26; *Harris v. Kemble*, 1 Sim. 111; 5 Bligh (N. S.), 730; 2 D. & C. 463; *Cox v. Middleton*, 2 Drew. 209; *Price v. Macauley*, 2 DeG. M. & G. 339; *Rawlins v. Wickham*, 1 Giff. 355; 3 DeG. & J. 304; *Higgins v. Samels*, 2 J. & H. 460; *Farebrother v. Gibson*, 1 DeG. & J. 602; but see *Johnson v. Smart*, 2 Giff. 151; *Cook v. Waugh*, 2 Giff. 201; *Boynnton v. Hazelboom*, 14 Allen, 107. The misrepresentation, when willful, intentional, or with knowledge, need not, necessarily, extend to the entire subject-matter of the contract, or affect all the relations created by such contract. A partial misrepresentation—that is, one applying only to some distinct portion of the subject-matter, or affecting only

sion of it will chiefly consist in analyzing and defining the elements of a misrepresentation, according to its legal meaning, so that it may be known whether the statements of a party in any particular case bring it within the operation of this principle. In addition to its effect in preventing the specific performance of a contract, misrepresentation may be a defense to an action at law on the contract, the cause of an action at law to recover damages for the deceit, and the basis of a suit in equity to rescind the contract. As the present inquiry is wholly concerned with the first-mentioned effect of misrepresentation in connection with specific performance, no reference whatever will be made to the others, except that cases involving them may be cited, when the particular rule under examination is the same for both subjects.

SEC. 211. A misrepresentation, when analyzed, consists of the following elements, all of which are essential to its full legal significance: 1. A positive statement or representation; 2, must be made for the purpose of procuring the contract; 3, must be untrue; 4, the knowledge and belief of the party making it; 5, the belief, trust and reliance of the one to whom it is made; and 6, its materiality. I shall examine these elements separately, so far as shall be necessary, in order to ascertain their application to, and effect upon, the remedy of specific performance; the purpose of the present treatise does not require or even admit an exhaustive discussion of the legal theory of misrepresentations.

SEC. 212. *I. Their form.*—A misrepresentation must be an affirmative statement or affirmation of some fact, in contradistinction to a concealment, omission or failure to disclose. In the great majority of instances it is made by language written or spoken; but it may consist of acts, when, by their means, it is intended to convey the impression, or to produce the conviction that some fact exists.(1) The

some particular terms of the agreement—if made with knowledge of its falsity or such ignorance of the truth as amounts in its legal effects to a knowledge of its falsity, will defeat a specific performance on behalf of the party making it. The plaintiff cannot, in such a case, waive the portion of the agreement embraced within his misstatements, and claim to have the rest of it enforced. The objection growing out of his conduct is *personal* to him; he must come into a court of equity “with clean hands.” *Lord Clermont v. Tasburgh*, 1 J. & W. 112, 120; *Cadman v. Horner*, 18 Ves. 10; *Boynton v. Hazelboom*, 14 Allen, 107; *Thompson v. Todd*, 1 Peters C. C. : 83.

(1) As where fraudulent experiments were performed, so as to induce a party to enter into a contract relating to a patent-right, *Lovell v. Hicks*, 2 Y. & C. Ex. 46; see, also, *Denny v. Hancock*, L. R. 6 Ch. 1, where the appearance of the grounds so misled the purchaser as to their boundaries, that the contract was

statement or affirmation must be of a fact. It is sometimes, but very incorrectly, said that a representation cannot be made of a matter of opinion. The true rule is, that the representation cannot itself be the mere expression of an opinion held by the party making it, but must be an affirmation of a fact; but the very fact concerning which the statement is made, may be an opinion. In other words, the existence of an opinion may be a fact material to a proposed contract; and, therefore, a statement that such opinion exists becomes an affirmation of a material fact, and if untrue, it is a misrepresentation. In all such cases, however, there must be the positive affirmation that the opinion is held by the specified person, that it exists as a fact, which is something quite different from the expression of an opinion.

SEC. 213. *II. The purpose for which the representation is made.*—The representation, whatever its form, must be made for the purpose and with the design of procuring the contract to be made—of inducing the other party to enter into the engagement. It must therefore be, of necessity, preliminary to the actual conclusion of the bargain, and, in the majority of instances, it is made during and forms a part of the negotiation.(1) Such being the object of a representation, it must be directly connected with the very contract, dealing with its subject-matter or other terms, and not be confined to other and distinct relations, transactions or matters with which the parties are concerned.(2) In order that a statement may produce the effect of a misrepresentation and be fraudulent within the legal conception, the party making it need not have any malignant feeling towards the other, nor any desire to injure, nor need he be actuated by any corrupt or wicked motive; for the law looks rather at the relations of the statement towards the real facts, and the results which will naturally flow from it, than at the mental condition, temper and feelings of the person who makes it.(3) If, therefore, a representation made prior to the agreement, and directly relating to it, is of such a character that it

not enforced. This was, of course, a mistake of his, but the mistake consisted of his obtaining from the appearance an impression which was the natural, if not necessary one, but at the same time contrary to the real fact.

(1) *Harris v. Kemble*, 1 Sim. 111, 122, per Sir JOHN LEACH. There may be cases where the representations cannot be said to form part of any negotiation or treaty between the parties. As, for example, prospectuses issued by companies, and similar publications, issued generally to all whom it may concern, are sometimes false representations, inducing persons to enter into contracts, and yet they cannot, with accuracy, be called a step in a negotiation. *Wells v. Millett*, 23 Wis. 64.

(2) *Harris v. Kemble*, 1 Sim. 111, 128; 5 Bl. (N. S.) 730.

(3) See *Polhill v. Walter*, 3 B. & Ad. 114; *Gibson v. D'Este*, 2 Y. & C. C. C. 542; *Wilde v. Gibson*, 1 H. L. Cas. 605.

would naturally induce, or tend to induce, any ordinary person to enter into the contract, and is in fact followed by a conclusion of the contract, then it will be presumed that it was made for the purpose and with the design of inducing the other party to enter into that agreement. The design will be inferred from the natural and necessary consequences.(1) It may be remarked here, that this requisite—the purpose to bring about the contract—exists to the same extent in all the remedial proceedings which may be based upon a misrepresentation—in both actions at law, in a suit for a rescission, as well as in a suit for a specific performance; so that the decisions made in each of the three former may be used to illustrate the latter.

(1) See *Torrance v. Bolton*, L. R. 8 Ch. 118; L. R. 14 Eq. 124, where a vendee was misled by a wrong description of the property sold at auction. The description was held to be misleading; that the *onus* was on the vendor to show that the purchaser was *not* misled; that actual fraud was not necessary to set aside a contract of sale—it is enough that such contract is unconscientious. *Aberaman Iron Works v. Wickens*, L. R. 4 Ch. 101, reversing L. R. 5 Eq. 485; *Leyland v. Illingworth*, 2 DeG. F. & J. 243; *Taylor v. Fleet*, 1 Barb. 471. Plaintiff wished to buy a farm, and particularly wanted one which was “early” in its productions; he was ignorant of the quality of all the land in the neighborhood, and had no means of ascertaining except by information from others. The defendant—the vendor—knowing plaintiff’s special wish to buy an early farm, and knowing that his own was not nearly so early as most others in the vicinity, in a negotiation with plaintiff for the sale of his own farm, stated that “there was no earlier land anywhere about there.” Plaintiff relied on this representation—made the purchase—and as soon as he ascertained the true character of the land, requested the defendant to rescind, which request was refused. Held, the representation was a sufficient ground on which to set aside the contract, even though the vendor had no intention to deceive the buyer. The discussions of the judges in the case of *National Exchange Co. v. Drew*, 2 McQueen, 103, are full and very instructive. A company, which was actually in a very bad financial condition, issued very flattering financial reports of its condition. Just after the last of these reports, the officers of the company, in order to counteract certain unfavorable rumors, and to prevent the price of its stock from falling in the market, persuaded the defendants to buy more stock of the company, and promised that if they would do so the company would advance the necessary funds to make the purchase, and that the stock should be held until it could be sold at a profit, and so the defendants would not have to pay out any money. Upon these representations and promises the defendants entered into the arrangement; the stock soon became worthless; the company sued defendants for the money which it had advanced as for a loan made by it to them; the defendants set up the company’s fraud in the whole transaction as a defense. The company replied that the loan by it to the defendants was one transaction, and the purchase of stock by the defendants was another and distinct one—the misrepresentation, if any, was made in connection with the latter alone, and did not affect or vitiate the loan. The House of Lords sustained the defense, holding that the loan and purchase were one transaction in any view of it, so that what concerned the purchase equally affected the loan. See cases cited *infra*, under head of *Materiality*, § 227.

SEC. 214. *III. The falsity of the statement.*—The statement must be untrue, or else there is no *mis*-representation. The entire doctrine of the law and of equity is based upon the assumption that the representation is in fact not true. This is the premise of fact which is assumed; it is not susceptible of any limitation or exception; it needs no discussion, and no citation of cases in its support.

SEC. 215. *IV. The knowledge or belief of the party making the statement.*—It is with reference to this element that the most important difference exists between the nature and effects of a misrepresentation considered as the foundation of an action or defense at law, of a suit in equity for a rescission, or of a defense to a suit for a specific performance. This difference, stated in general terms, consists in the greater amount of knowledge, belief or intention which must enter into the representation when it is the basis of a legal action or defense, and of an equity suit for affirmative relief, than is required when it is used merely to defeat the specific enforcement of a contract. It is of the utmost importance, therefore, to discriminate between these two uses, and to remember that the particular doctrines established by the decisions rendered in the former class of cases, are not necessarily applicable to cases which fall within the second class. The indiscriminate citation of such authorities, simply because they relate to the general subject of fraudulent representations, has done much to obscure a subject which in itself is comparatively simple and clear. The special rules governing the action for deceit, and the defense of fraud in a legal action on a contract, and to a partial extent the equity action of rescission, have, undoubtedly, become refined, and subject to many limitations; but those which control the suit for a specific performance are simple, plain, and free from technicality or intricacy. It will be necessary to state the general doctrine which obtains in the former kinds of proceedings; but I shall give it very briefly, and only so far as may be essential for the better understanding of that which belongs to the remedy of specific performance.

SEC. 216. In an action at law to recover damages for the deceit, and in the defense to a legal action on the contract, and in a suit in equity for a rescission, in order that the misrepresentation shall be effective, it is essential and it is also sufficient, that the statement is untrue, and that the party when making it did not believe it to be true, for then the law will infer that it was made with a fraudulent intent. It is not necessary that the party making the representation should have



absolute knowledge that it is false.(1) Of course, if he has this knowledge the case is stronger, the fraud more striking, and the invalidity of the contract more palpable, than where he merely has no belief in the truth of his statement. If, however, although the statement is false, the party making it actually believes it to be true, there is no sufficient misrepresentation on which to maintain an action for deceit.(2) Again, where the party has no absolute knowledge that his statement is false, and believes upon reasonable grounds that it is true—the affirmation not being made in such utter ignorance of the facts that he is taken to warrant his belief in its truth—the untruth of the representation is not a defense to a legal action on the contract.(3)

(1) *Taylor v. Ashton*, 11 M. & W. 401; *Smout v. Ilbery*, 10 M. & W. 10, per ALDERSON, B.; *Evans v. Edmonds*, 13 C. B. 777, 786, per MAULE, J.: "I conceive that if a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts." These decisions were made in actions at law. In *Torrance v. Bolton*, L. R. 8 Ch. 118; L. R. 14 Eq. 124, property was sold at auction which was described by the vendors, in the preliminary notice of sale, as "an immediate, absolute reversion of a freehold estate falling into possession on the death of a lady seventy years old." At the sale itself certain conditions were read by the auctioneer, but not printed nor circulated, which stated that the property was subject to three mortgages. The plaintiff, who was deaf, did not hear these conditions, and did not know he was buying only an equity of redemption, but purchased on the faith of the first mentioned description in the notice of sale. He brings this suit to set aside the sale. Held, that the description was a misrepresentation and misleading; that the *onus* was on the vendor to show that the vendee was not misled. Actual fraud is not necessary to the setting aside of a contract for the sale of land; the court will set aside a contract which is unconscientious. *Aberaman Iron Works v. Wickens*, L. R. 4 Ch. 100, reversing L. R. 5 Eq. 485. A definite statement of what the party does not know to be true, if false, will have the same legal effect as such a statement of what the party knew to be untrue. The not knowing it to be true, is as truly the essential element of *fraud*, as the actual knowing it to be false. See *Fisher v. Worrall*, 5 W. & S. 483; *Tyson v. Passmore*, 2 Barr. 122. But these questions concerning the *scienter* have little necessary connection with specific performance.

(2) *Early v. Garrett*, 9 B. & C. 928; *Freeman v. Baker*, 5 B. & Ad. 797; *Moens v. Heyworth*, 10 M. & W. 147. When the party at the time of making the representation believes it to be true, and is innocent of any wrongful purpose, but afterwards discovers its falsity, and nevertheless does not undeceive the other party, but permits him to continue his acts as though the statement had been true, his concealment renders the representation fraudulent as well as false, and is a ground for affirmative equitable relief. *Reynell v. Sprye*, 1 DeG. M. & G. 660, 709.

(3) The question of false representation as a defense to an action at law on a contract was largely discussed in *Cornfoot v. Fowke*, 6 M. & W. 358. An agent,

SEC. 217. Much less is requisite to prevent the specific enforcement of a contract. So far as this element of a misrepresentation is concerned, it is sufficient to defeat a specific performance, that the statement is actually untrue so as to mislead the party to whom it is made; the party making it need not know of its falsity, nor have any intent to deceive; nor does his mere belief in its truth make any difference. With respect to its effect upon the specific enforcement of a contract, a party making a statement as true, for the purpose of influencing the conduct of the other party, is bound to know that it is true. (1) ( In maintaining the defense to a suit for specific performance,

without intending to deceive, made a statement which was untrue, but which he did not know to be so, and his principal knew all the facts, but made no representation. It was held, after much discussion, that there was no fraud, and, therefore, no defense. The agent himself was guilty of no fraud, since he made the statement innocently, and the knowledge of the principal, who took no part in the representation, could not be imputed to him. See, also, *National Exchange Co. v. Drew*, 2 McQueen, 103; *Fuller v. Wilson*, 3 Q. B. 58; *Wilson v. Fuller*, 3 Q. B. 68. In *Young v. Covill*, 8 Johns. 23, it was said of an action for deceit, that "it cannot be maintained without proving actual fraud in the defendant, or an intention to deceive the plaintiff by false representation. The simple fact of misrepresentation, unconnected with fraudulent design, is not sufficient. The defendant made no representation of facts within his knowledge. \* \* \* The advice was rash and indiscreet, but there is no ground from which to infer that it was deceitful. Deceit is the gist of the action." *Benton v. Pratt*, 2 Wend. 385; *Gallagher v. Mason*, 6 Cow. 346. See *Joice v. Taylor*, 6 Gill. & Johns. 54, a case of rescission on the ground of misrepresentation.

(1) *Ainslie v. Medlycott*, 9 Ves. 13, 21; *Wall v. Stubbs*, 1 Mad. 80. The following are examples of misrepresentations which have been alleged as a defense in suits for a specific performance. In *Powell v. Elliott*, L. R. 10 Ch. 424, the vendors sued to enforce a contract for the sale of large colliery works. The defendants alleged misrepresentations by the vendors as to the value. It was found, as a fact, that the vendors had misrepresented the amount of stores consumed on the works, and consequently had largely overstated the income. Specific performance was decreed with a deduction from the price bearing the same ratio to the price agreed that the excess in the statement of income bore to the whole income as represented. In *Harnett v. Baker*, L. R. 20 Eq. 50, which was a vendor's suit, the contract stipulated that the title to the beneficial ownership should commence with the will of one A. C., and the purchaser must assume that A. C. was, at his death, beneficially owner of the property in fee simple, free from all incumbrances. In fact, A. C. had only contracted for the purchase of the property, and it was not until many years after his death that the property was conveyed, and the price was paid. *Held*, that the provision of the contract was too misleading; the purchaser was not bound by it, and a specific performance was refused. In *Upperton v. Nickolson*, L. R. 6 Ch. 436; L. R. 10 Eq. 223, also a vendor's suit, the land was described in the contract as freehold. It turned out that having formerly been copyhold, it had been enfranchised under a statute, but the minerals were reserved to the lord of the manor. This was held a fatal objection to the title. In *Whittemore v. Whittemore*, L. R. 8 Eq. 603, defendant

the knowledge, belief, or intent of the party making the representation is wholly immaterial, and the question is not raised. The point upon which the defense turns, is the *fact* of the other party having been misled by a representation calculated to mislead him, and not the existence of a design to thus mislead. It follows, as a plain consequence of this general doctrine, that if a party makes a misrepresentation, whereby another is induced to enter into an agreement, he cannot escape from its effects by alleging his forgetfulness at the time of the actual facts.<sup>(1)</sup> Where the misrepresentation does not

had bought land at an auction, which was described in the particulars of sale as containing 753 square yards, or thereabouts; and the contract stipulated that if any error, mistake, or omission in the description should be discovered, it should not annul the sale, nor should any compensation be paid. The land, in fact, contained only 573 square yards. *Held*, that the above stipulation applied only to small errors and did not cover so large a deficiency, and in granting a specific performance the vendee was entitled to a deduction from the price. In *Leyland v. Illingworth*, 2 DeG. F. & J. 248, defendant agreed to buy a warehouse and other property in a city, which was described in the particulars of sale as "well supplied with water." It was found, as a matter of fact, that from the situation of similar properties in the same place this would naturally mean, supplied with water by a natural supply, like a well, etc.; in fact, the water was supplied by public water-works, for which the tenant would have to pay about \$100 a year water rent. Defendant claimed this was a misdescription. *Held*, it was, per L. J. KNIGHT BRUCE, p. 252: "The particulars were materially inaccurate, were importantly otherwise than true, though I do not impute fraudulent or dishonest intention to any one. The purchaser says that he is consequently entitled, either to be released from his bargain or to have compensation for the misrepresentation, and in this claim I think him right." Per L. J. TURNER, p. 254: "The description is a representation of a fact, and the true question is, whether it was a fair representation of the fact. I am of opinion that it was not; that it was calculated to lead the purchaser to believe, as I am satisfied, upon the evidence, that he did believe that there was a supply upon the property itself." See, also, *Dyer v. Hargrave*, 10 Ves. 505; *Price v. Macaulay*, 2 DeG. M. & G. 339; *Denny v. Hancock*, L. R. 6 Ch. 1. In none of these cases was there the slightest suggestion of any intention to deceive on the part of the vendor; nor even an allegation that he knew of the wrong description. The question of his knowledge, belief, or intent, was wholly immaterial, and was not raised, because the decision could not turn upon it. It is the fact of the other party's being misled, and not the design to mislead him, which constitutes the defense. *Holmes' Appeal*, 77 Pa. St. 50, an agreement to purchase a farm made in reliance upon the vendor's false statement that the neighborhood is healthful, will not be specifically enforced against the purchaser; and *it seems* that a contract to purchase a farm situated in a neighborhood subject to fever and ague, of which fact the vendee was ignorant, but the vendor was well informed, and which fact the vendor did not disclose to the purchaser, will not be specifically enforced against the purchaser, even though no false representations were made to him by the vendor; and see, also, *Swinn v. Bush*, 23 Mich. 99.

(1) In such a case, a vendor having made a misstatement to the purchaser, and alleging that he did not, at the time, recollect the fact, Sir Wm. GRANT said of this excuse: "The plaintiff cannot dive into the secret recesses of his heart, so as to

extend to the entire scope of the agreement, or even to any of its most important parts, but relates merely to some incidental, subordinate, or collateral feature of it, the court, instead of denying all relief to the plaintiff, may direct a specific performance, with an abatement of the price, or other form of compensation to the defendant.(1) Although an untrue and misleading statement of fact is all that is necessary to prevent the enforcement of a contract in equity, yet when the misrepresentation is so coupled with knowledge or fraudulent intent as to be a sufficient ground for an action or defense at law, or for a suit in equity to rescind, it will *a fortiori* defeat the remedy of specific performance.

SEC. 218. V. *The effect of the representation on the party to whom it is made.*—Another element of a misrepresentation, alike requisite in every species of remedy, legal or equitable, is, that it must be relied upon by the party to whom it was made, and must be so far an immediate cause of the contract that without it the agreement in question would not have been concluded. Unless an untrue statement is believed and acted upon, it occasions no legal injury. It is essential, therefore, that the party addressed should trust the representation, and be so strongly induced by it, that, judging from the ordinary habits and practices of men, in the absence of it, he would not in all reasonable probability have entered into the contract.(2)

It is not necessary that the representation should be the sole inducement; others may have concurred with it in influencing the party; but still it must be so cogent in its effects, that, without it, the agreement in all reasonable probability would not have been made.(3)

know whether he did or did not recollect the fact, and it is no excuse to say that he did not recollect it." *Burrows v. Lock*, 10 Ves. 476; and, also, see *Price v. Macaulay*, 2 DeG. M. & G. 339; *Bacon v. Bronson*, 7 Johns. Ch. 194. The same is true when the suit is for a rescission, and the defendant has untruly stated something which is within his own knowledge; he cannot be held to assert that he forgot the truth when he made the statement.

(1) See several of the cases cited in the last note but one, under § 217.

(2) It is certainly incorrect to lay down this rule, as it is often found both in judicial opinions and in text writers, namely, "the inducement must be so strong that without it the party would not have entered into the contract." It is impossible to state such a future and contingent matter with absolute certainty, and the most that can be said with truth or be required, in order to formulate a practical rule is, that in all reasonable probability, judging from the common experience of mankind, the party would not have concluded the agreement.

(3) As this particular element of a misrepresentation must exist, whatever be the nature and form of the judicial proceeding, whether an action at law for deceit, or a defense to an action at law upon the contract, or a suit in equity for a rescission, or a defense to a suit in equity for a specific performance,

SEC. 219. In determining the effect of a reliance upon representations it is most important to ascertain, in the first place, whether the statement was such that the party was justified in relying upon it; or such, on the other hand, that he was bound to inquire and examine into its correctness himself. There is, in this respect, a broad distinction between statements of fact which really form a part of, or are essentially connected with, the substance of the agreement, and representations which are mere expressions of opinion, hope, or expectation, or are mere general commendations. Upon statements of the first kind, and especially where they are concerning matters which, from their nature or situation, may be assumed to be within the knowledge or under the power of the party making the representation, the party to whom it is made has a right to rely; he is justified in relying upon them, and in the absence of any knowledge of his own, or of any facts which should arouse suspicion and cast a doubt upon the truth of the statements, he is not bound to make inquiries and examination for himself. It does not, under such circumstances, lie in the mouth of the person asserting the fact to object or complain because the other took him at his word; if he claims that the other party was not misled, he is bound to show clearly that such party did know the real facts.(1) Where, however, the representation is of the

the decisions made in the first three kinds of actions may be cited to illustrate the application of the doctrine to the last. In the leading case of *Atwood v. Small*, 6 Cl. & Fin. 447, which was a suit for a rescission, Lord BROUGHAM thus sums up the doctrine as derived from the prior decisions: "Now, my lords, what inference do I draw from these cases? It is this: that general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to overreach go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design can be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place, and must have given rise to this contract." In *Taylor v. Fleet*, 1 Barb. 475, another suit for a rescission, it was said: "It is undoubtedly true that to avoid a contract on the ground of misrepresentation, there must not only be a misrepresentation of a material fact constituting the basis of the sale, but the purchase must have been made upon the faith and credit of such representation. At least the purchaser must so far have relied on them as that he would not have made the purchase if the representations had not been made." In *Addington v. Allen*, 11 Wend. 375, an action based on the deceit, it was held that "although other inducements besides the representations may have operated in the giving credit, it is enough if the vendor is moved by such representations, so that without them the goods would not have been parted with."

(1) In *Leyland v. Illingworth*, 2 De G. F. & J. 248, the facts of which are given *ante*, the representation was held to have been of this kind, and that the purchaser had a right to rely on it and was not bound to inquire. *L. J. TURNER*,

second kind—where it consists of general commendations, or mere expressions of opinion, hope, expectation and the like—and especially where it concerns matters which cannot, from their nature, position, or time, be supposed to be within the knowledge or under the power of the party making the statement, the party to whom it is made is not justified in relying upon it and assuming it to be true; he is bound to make inquiry and examination for himself so as to ascertain the truth; and, in the absence of evidence, it will be presumed that he has done so, and acted upon the results of his own inquiry and examination. He cannot be heard to claim that he was misled by the statement in defense of a specific performance.(1)

p., 253, 254, said: "If the question had been whether the supply of water was adequate or inadequate, the case would probably have fallen within the authorities referred to in opposition to the purchaser's claim. It would have been a question of opinion, not of fact, and the purchaser would have been put upon inquiry. But there is no such question in this case. The description is a representation of a fact," etc. To the same effect, see *Dyer v. Hargrave*, 10 Ves. 505; *Price v. Macaulay*, 2 DeG. M. & G. 339; *Martin v. Cotter*, 3 Jo. & Lat. 496, 507; *Wall v. Stubbs*, 1 Mad. 80. *Aberaman Iron Works v. Wickens*, L. R. 4 Ch. 100, reversing L. R. 5 Eq. 485, is a very instructive case. It was a suit by a vendee to set aside a sale on account of vendor's misrepresentation as to quantity of the land. *Held*, that although the plaintiffs might have been able to have ascertained the real quantity, they were not bound to do so, and the contract was rescinded. See, also, *Holmes' Appeal*, 77 Pa. St. 50; *Swimm v. Bush*, 23 Mich. 99, which was a suit brought by the vendee, holds that a misrepresentation and concealment of material facts with respect to the value and other features of the land, made by vendee during the negotiation and preventing or naturally tending to prevent investigation or inquiry by the vendor, who was himself personally unacquainted with the land in question, while the purchaser had full knowledge respecting it, will prevent the vendee from obtaining a decree for a specific performance against the vendor. It may be laid down as a general proposition that where the representation is definite, affecting the value of the subject-matter or otherwise inducing the party addressed to enter into the contract, and it turns out to be untrue—whether *actually known* to be untrue by the one making it is immaterial—the party misled, especially if he had no means of ascertaining the truth of the statements, can on this account successfully resist a specific performance; if, however, he seeks the more radical remedy of a rescission, or even the legal remedy of damages in an action for deceit, the actual knowledge of the untruth, or what is deemed equivalent thereto, is an essential element of the misrepresentation. See *Lord Brooke v. Rounthwaite*, 5 Hare, 298; *Stewart v. Alliston*, 1 Meriv. 26; *Brealey v. Collins*, Younge, 317; *Lowndes v. Lane*, 2 Cox, 363; *Harris v. Kemble*, 1 Sim. 111; 5 Bligh (N. S.), 730; *Cox v. Middleton*, 2 Drew. 209; *Price v. Macaulay*, 2 DeG. M. & G. 339; *Rawlins v. Wickham*, 1 Giff. 355; 3 DeG. & J. 304; *Higgins v. Samels*, 2 J. & H. 460; *Farebrother v. Gibson*, 1 DeG. & J. 602; *Johnson v. Smart*, 2 Giff. 151; *Cook v. Waugh*, 2 Giff. 201; *Boynton v. Hazleboom*, 14 Allen, 107; *Best v. Stowe*, 2 Sandf. Ch. 298; *Fisher v. Worrall*, 5 W. & S. 483.

(1) *Dyer v. Hargrave*, *supra*; *Scott v. Hanson*, 1 Sim. 13; 1 R. & My. 128; *Trower v. Newcome*, 3 Meriv. 704; *Fenton v. Browne*, 14 Ves. 144; *Brealey v. Collins*,

SEC. 220. Several of the causes which raise a presumption that representations were not relied upon by the party to whom they were made, and which therefore destroy their efficacy as a defense, were summed up by Lord LANGDALE, in language which I quote(1): "Cases have frequently occurred in which upon entering into contracts, misrepresentations made by one party have not been, in any degree, relied on by the other party. If the party to whom the representations were made himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party. Or, if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which upon due inquiry he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded. Again, when we

Younge, 317; Brooke v. Roundthwaite, 5 Hare, 298; Lowndes v. Lane, 2 Cox, 363; Abbott v. Swarder, 4 DeG. & Sm. 448; Colby v. Gadsden, 34 Beav. 416. As an illustration, in Jennings v. Broughton, 17 Beav. 234; 5 DeG. M. & G. 126, it was held that in a contract for the sale of a mine, there would be an essential difference between a representation of what was actually to be seen or had been seen at the works, and a general statement of its expectations, prospects and capacities—the latter being in their very nature contingent and speculative—and respecting which the buyer was as able to judge as the seller. In Trower v. Newcome, *supra*, an advowson had been sold at auction, the written particulars describing it stating that "a voidance of the preferment was likely soon to occur," but not speaking of the then present incumbent. At the sale the auctioneer announced that "the living would be void on the death of a person aged 82." (It must have been that this statement was made without authority and did not bind the vendor, for otherwise it seems to be a representation in the clearest possible manner of a most material fact). In truth, the then incumbent was only 32 years old. Sir WM. GRANT held that the representation made by the particulars was so vague and general, and so entirely a matter of speculation or opinion that the purchaser was only put on the inquiry by it, and could not claim to have been misled, and he decreed a specific performance. In Scott v. Hanson, *supra*, a statement that the land sold "was uncommonly rich water meadow," was only a general commendation which should not prevent a specific enforcement, although in truth it was very poorly watered. In Hume v. Pocock, L. R. 1 Ch. 379; L. R. 1 Eq. 423, *held*, that the mere assertion by the vendor that he has a good title, on the faith of which the vendee relies without investigating the title, is not necessarily such a misrepresentation as will preclude the vendor from enforcing his contract. See Jeffreys v. Fairs, L. R. 4 Ch. D. 448, for a case where the representation made without knowledge or any possible intent to mislead, was held no defense, because it was of such a nature that the purchaser took his chance.

(1) Clapham v. Shillito, 7 Beav. 146, 149, 150.

are endeavoring to ascertain what reliance was placed on representations, we must consider them with reference to the subject-matter and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made to him by him, who was supposed to be better informed; but if the subject is in its nature uncertain—if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, and equal skill, it is not easy to presume that representations made by one would have much or any influence upon the other.”

SEC. 221. In this extract there are mentioned the following cases, in which the party cannot claim to have been misled by the misrepresentation: 1. When, before entering into the contract, he actually resorts to the proper means of ascertaining the truth and verifying the statement. 2. When, having the opportunity of making such examination, he is charged with the knowledge he would have obtained, if he had made it. 3. When the representation is concerning generalities, equally within the knowledge or means of acquiring knowledge by both parties. 4. But where the representation is concerning facts, of which the party making it has, or is supposed to have, knowledge, and the other party has no such advantage, and is not described by either of the first two cases, then it will be presumed that he relied on the statement; he is justified in doing so. The two latter cases have been discussed in preceding paragraphs. The first and second cases are really one; they depend upon the same principle, and the only difference between them is one of proof—a fact being distinctly proved in one, which is irresistibly inferred in the other. If, after a representation of fact, no matter how positive, the party receiving it institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, the claim that he relied upon the first statement, and was misled by it, cannot be admitted; it would be untrue; and, if allowed as a defense, would furnish a ready means of avoiding all contracts with which a party had become dissatisfied. The same result must plainly follow, when, after the representation, the party receiving it has given to him a sufficient opportunity of examining into the real facts, when his atten-



tion is directed to the source of information, and he commences, or purports or professes to commence the investigation. The plainest motives and grounds of convenience and expediency demand that, in such circumstances, he must be charged with all the knowledge which he might have obtained had he pursued the inquiry with care and thoroughness to the end. He cannot be heard to allege that he did not learn the truth; he cannot claim to have been misled.<sup>(1)</sup> The

(1) In accordance with the doctrine stated in the first branch of the above proposition, Lord HOLT made the following remarks in deciding an action for deceit, the principle being the same in all forms of judicial proceedings based upon misrepresentation. *Lysney v. Selby*, 2 *Ld. Raym.* 1118, 1120: "If the vendor gives in his particular of the rents, and the vendee says he will trust him, and inquire no further, but rely on his particular, then, if the particular be false, an action will lie; but if the vendee will go and inquire further what the rents are, then it seems unreasonable he should have any action, though the particular be false, because he did not rely on the particular." The great case of *Small v. Attwood*, 6 *Cl. & Fin.* 232, is an admirable illustration of the second branch of the proposition, and was finally decided in the House of Lords, by an application of its doctrine. Attwood had bargained to sell his works, and had made representations in regard to them, and the matter claimed in the case was the falsity of these statements. But during the negotiations, the vendee had sent a committee to the works for the express purpose of examining into the truth of the statements. As a matter of fact, they made a very superficial and incomplete examination, and did not discover all the truth; but they had the opportunity to make a thorough investigation; they were engaged in the same business, and were, therefore, experts; they were satisfied with what they saw, and reported favorably, and the contract was concluded. On a suit for a rescission of the agreement, the House of Lords held that the vendees, by their own acts, had cut off any claim to being misled, and must be charged with the full knowledge which they might have obtained. If a purchaser chooses to judge for himself, and does not thoroughly use all the opportunities and sources of information open or offered to him, he cannot be permitted to set up his own carelessness or imprudence, and claim to have been misled. Another important case, illustrating the same doctrine, is *Jennings v. Broughton*, 17 *Beav.* 234, 5 *DeG. M. & G.* 126. Plaintiff had bought shares in a mine, certain statements as to the mine having been made by the vendor. The suit was brought to rescind the sale, on the ground that these statements were untrue. The vendee had visited the mine before concluding the bargain to look for himself; the statements were concerning matters which he might have found out during his investigation, and it was held by the *M. R.*, and on appeal among other grounds, that he must be taken to have ascertained the truth, and could not claim to have been misled by the representations. *Lowndes v. Lane*, 2 *Cox*, 363, is another illustrative case. A purchaser had bought property consisting partly of woods, on the representation that they had yielded from timber cut and sold from them two hundred and fifty pounds a year on the average for fifteen years. He claimed that this representation was practically false and really misleading—not because the woods had not, in fact, yielded that sum, but because they had not been used in a proper manner, and according to ordinary, fair husbandry, and if so used they would not have produced nearly so much. This objection would probably be fatal in England, where woodland is

ground of this latter rule is the practical impossibility, in any judicial proceeding, of ascertaining exactly how much knowledge the party actually obtained from his inquiry, and the opportunity which a contrary rule would give to a purchaser or other contractor of repudiating an agreement fairly entered into, with which he had become dissatisfied.

SEC. 222. In accordance with this principle, if the party to whom a misrepresentation has been made, after having ascertained the real facts of the case, and thus discovered the untruth of the statements, goes on acting in pursuance of the contract, treats the property acquired under it as his own, or otherwise conducts himself with respect to it as though it were a subsisting and binding engagement, he thereby waives the benefit of the misrepresentations, and cannot allege them as a ground either for rescinding or resisting enforcement of the agreement. In other words, the party who has been misled is required, as soon as he learns the truth and discovers the falsity of the statements on which he relied, with all reasonable diligence to disaffirm the contract, and give the other party an opportunity of rescinding it, and of restoring both of them to their original position. The party deceived is not allowed to go on deriving all possible benefit from the transaction, and then claim to be relieved from his own obligations by a rescission or a refusal to execute. For example, if a lessee, after discovering the untruth of representations, continues to work mines which he had leased; or a vendee continues to use the land purchased as his own.<sup>(1)</sup>

SEC. 223. The principle stated in the last paragraph but one, is also applied under a slightly different condition of circumstances. If

exceedingly valuable, and where the mode of using it is guided by many strict rules of practice and of law. But, as a fact, before concluding the contract, a paper was delivered to the purchaser and kept in his possession, which, if examined, would have shown him conclusively that the woods had not been used in this ordinary manner, but that the timber had been unequally and extravagantly cut. He was held chargeable with the knowledge which he might and ought to have obtained, and so was not misled.

(1) *Vigers v. Pike*, 3 Cl. & Fin. 562, 650, per Lord COTTENHAM. In *Whitney v. Allaire*, 4 Denio, 554, it was *held*, that where a party to an agreement discovers the fraud of the other subsequently to making the contract, but before its performance, and with such knowledge, goes on and performs on his part, he is thereby prevented from rescinding the agreement, or recovering back the consideration, but is not cut off from recovering damages for the deceit. *Voorhees v. De Meyer*, 2 Barb. 37; *Woodcock v. Bennett*, 1 Cow. 711; *Masson's Appeal*, 20 P. F. Smith, 26, 29; *Anthony v. Leftwich*, 3 Rand. 258; *Slaughter v. Tindle*, 1 Litt. 358; *McCorkle v. Brown*, 9 Sm. & Mar. 167; *Gibbs v. Champion*, 3 Ohio, 335; *Pratt v. Carroll*, 8 Cranch, 471.

the party receiving a misrepresentation is, at the time when it is made, either from knowledge acquired previously, or from information obtained at that very moment, fully aware of the truth, acquainted with the facts as they really are, he cannot claim to be misled, and cannot disaffirm or defeat the agreement on the ground that it was procured by means of the false statements. The case of patent defects is merely an application of this equitable doctrine. If, in a contract of sale or leasing, representations are made by the vendor concerning some incidents, qualities, or attributes of the subject-matter which are open and visible, so that the falsity of the statements are patent to any ordinary observer, and it is made to appear that the purchaser, at or shortly before the time of concluding the contract, had seen the thing itself which constitutes the subject-matter, then a knowledge of the facts is chargeable upon the purchaser; he is assumed to have made the agreement knowingly, and cannot allege that he was misled by the false representations. This special rule requires that the thing concerning which the statements are made, should be seen by the purchaser, and that the defects should be plainly open and patent to any ordinary observer; that no means should be used to conceal them, or to divert the buyer's attention from them.(1)

(1) *Dyer v. Hargrave*, 10 Ves. 505, per Sir WM. GRANT, is the leading case. A farm sold was described in the contract as "all lying within a ring fence," which was utterly untrue. The purchaser, however, was clearly proved to have always lived in the immediate neighborhood, to have been familiar with the farm, and to have seen it just before making the contract. He was held to have known that the land was not enclosed by a ring fence, and not to have been misled by the statement, and specific performance was enforced. In *Bowles v. Round*, 5 Ves. 508, per Lord ROSSLYN, a meadow was bought, around which was a road, and across which was a way, and these facts were not mentioned in the description contained in the contract; but as those matters were plainly visible to the most casual observer, and as the vendee had seen the land, his claim to have been misled by the description was overruled. See, also, *Pope v. Garland*, 4 Y. & C. Ex. 394. That the defects which render the representation false, must be plainly open, so that their existence will be perceived and known by any ordinary observer, is illustrated by *Shackleton v. Sutcliffe*, 1 DeG. & Sm. 609. A piece of land was purchased which was adjoining to another piece which was on a lower level. On the upper land was a spring, and on the lower land were certain wells which were connected with the spring by gutters, through which the water ran from the spring to the wells. It turned out—a fact unknown to the purchaser when he made the contract—that the upper land was subjected to an easement in favor of the lower tenement, by which the owner of the latter was entitled to a water supply from the spring, and to enter upon the upper land, and make, maintain and clear out the conduits or gutters, etc.—on the whole a very

SEC. 224. The principle announced in the three preceding paragraphs is to be taken, however, with the following most important limitation, or, rather, qualification. Where a representation is made of facts which are or may be assumed to be within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on and being misled by it, and which shall thus obviate its effects upon the validity of the agreement, must be clearly and conclusively established by the evidence. The mere existence of opportunities for examination, or sources of information, is not sufficient, even though by means of these opportunities and sources, in the absence of any representation at all, a constructive notice to the party would be inferred, of a condition of fact contrary to that stated by the representation; the doctrine of constructive notice does not apply where there has been such a representation of fact.(1) If a vendor claims that the invalidating effects of his misrepresentations are obviated, that the purchaser was not misled by them, either because they were concerning patent defects in the subject-matter, or because he was from the outset acquainted with the real facts, or because he had made inquiry and thereby ascertained the truth, the qualification above mentioned plainly applies; it is plainly incumbent on the vendor to *prove* the alleged knowledge of the purchaser by clear and positive evidence, and not to leave it a matter of mere inference or implication; an opportunity or means of obtaining the knowledge is not enough.(2) The qualification

substantial burden upon the land bought. The vendee set up this defect as an objection to completing his purchase. It was proved in answer by the plaintiff, that defendant—the vendee—was well acquainted with the premises, had frequently, on passing along the road, seen the wells on the lower tenement and the conduits connecting them with the springs, and was on the land itself the very morning of the sale. But *V. C. KNIGHT BRUCE*, without entering into the reasons for his decision, held that the vendee had not a sufficient amount of knowledge of the true facts to prevent him from making the objection. It may be added, that the real objection was the *right* of the lower owner to use the upper land, to draw water and to enter on it from time to time, etc. Although the vendee had seen the wells and conduits, this did not necessarily inform him of the existence of any such right—in other words, the defect was not *patent*, but was *latent*. See, also, *Grant v. Munt*, *Coop.* 173.

(1) *Drysdale v. Mace*, 2 Sm. & Gif. 225, 230.

(2) The vendor “must show very clearly, that the purchaser knew that to be untrue which was represented to him as true; for no man can be heard to say that he is to be assumed not to have spoken the truth.” *Price v. Macaulay*, 2 DeG. M. & G. 346, per *KNIGHT BRUCE*, L. J.; and see, *Wilson v. Short*, 6 Hare, 366, 378; *Dyer v. Hargrave*, 10 Ves. 505; *Higgins v. Samels*, 2 Johns. & H. 460; *Harnett v. Baker*, L. R. 20 Eq. 50.

no less applies to the case mentioned in section 221, where the party receiving a representation has given to him an opportunity of examining into the real facts, or where his attention is directed to the sources of information. The mere opportunity, or the means of investigation, are not sufficient. Undoubtedly, they might or would, had there been no representation, have put the party upon the inquiry, and would, therefore, amount in law to a constructive notice of the facts which might have been learned by such inquiry; but the positive representation of a fact cannot be counteracted by such implication. It must be shown that the party proceeded, in some measure, to avail himself of the opportunity; that he took some steps in making an independent investigation, so that, although his examination might not have been thorough, complete, and successful, yet he must be charged with the knowledge he would have acquired by means of a complete investigation. In other words, it must appear, that through the opportunity and means of inquiry he received *some* information concerning the actual facts, so that, from considerations of expediency, he could not be allowed to allege his failure to obtain *all* the knowledge which he might have acquired.(1) There is no contradiction here. The question

(1) *Price v. Macaulay*, 2 DeG. M. & G. 339; *Gibson v. D'Este*, 2 Y. & C. C. C. 542, 572. The case of *Small v. Attwood*, cited *supra*, well illustrates this position. The vendors of the works made certain positive statements concerning it. The mere fact that the vendees could have visited the works, and by a personal examination have ascertained all the facts, for themselves, would not lessen the effect of this representation. Even had the vendors invited the purchasers to come—given them an express opportunity to investigate—directed their attention to this means of verification, etc.—this would not have altered the result. The vendees would have had a right to say, no, you have made a statement concerning an existing condition of fact which is all within your own knowledge—true, we can come and verify this statement for ourselves, but we are willing to rely on your representation and complete the purchase. Had they done so, they would have been justified in doing it, and could have rescinded the contract. But they did not do so. They acted on the opportunity; they availed themselves of the means; they took some steps in making an investigation; and thus some information as to the true condition of matters was communicated to their minds. That the investigation was not thorough, and the knowledge obtained perfect, was their own fault; what it was, they relied on it and not on the representation. The case of *Cox v. Middleton*, 2 Drew. 209, is also a good illustration. A vendor, in negotiating the sale of a house, stated that it was “substantially and well built,” which was untrue. Although the vendee could very easily have inspected the house, and examined it for himself whether it was well or poorly built, he was not obliged to do so, and did not; and it was held, that this opportunity of his did not impair the effect of the misrepresentation, and a specific performance was refused. It is also held in several cases, that where a vendor makes untrue statements respecting a lease—respecting its provisions and covenants—although the law would charge the vendee with constructive notice of what these covenants, etc.,

is, did the party—purchaser, generally—rely on the representation, or on his own knowledge? To obviate the effect of the representation, it must be clearly and conclusively shown that he relied on *his own knowledge*. This the general doctrine and the qualification both demand. But neither of them require that this knowledge be perfect, complete, accurate. Where there is an opportunity, or means of examination, the party may decline to use it, for he has a right to rely on the representation of fact, and to remain personally in ignorance. If, however, he takes steps in an investigation and thus obtains some independent knowledge, and afterwards concludes the agreement, he must be assumed to have concluded it upon the strength of that acquired knowledge, however partial and deceptive, and not upon the representation. Where, however, there is no investigation made after the representation, in order to test it, but the vendor claims that his statements have not misled, because the defects were patent, or because the buyer was, from the outset, acquainted with all the facts; there it is the completeness and accuracy of the purchaser's knowledge alone which counteracts the effect of the representation and shows that it was not relied upon and did not mislead; in such case, therefore, it must be shown that the purchaser's knowledge of all the material facts, covered by the misrepresentation, was full, accurate, and perfect. The vital question in each case, however, is, did the party receiving the representation rely upon it, in concluding the agreement, or did he rely upon his own knowledge?

SEC. 225. This rule that some independent *knowledge* of the true facts must be brought home to the party receiving such a representation, in order to counteract its effects in misleading him, and to prevent his reliance upon it, is of wide, of general application. Nothing done by the party making the statement, and no extrinsic circumstances will avail, unless they clearly lead to the conclusion that the contract was concluded upon the strength of information, or substantial grounds for forming a judgment other than the representation itself. A representation of fact, such as has been assumed throughout this entire discussion, cannot be obviated by any general statements of the party making it or by any extrinsic circumstances which merely admit of or warrant an inference contrary to or in conflict

are, yet such notice does not obviate the effects of the false statements—the representation overrides what would otherwise be taken at law as a knowledge, on the part of the purchaser, and he can take advantage of it as against the vendor. *Van v. Corpe*, 3 My. & K. 269; *Flight v. Barton*, 3 My. & K. 282; *Pope v. Garland*, 4 Y. & C. Ex. 394, 401.

with the representation, even though of themselves such statements or such circumstances might be sufficient to put the other party upon the inquiry. This is simply another application of the principle that the right of a party receiving a representation to rely upon it, cannot be taken away or interfered with by inference or implication.(1) Where, therefore, the party accompanies or follows his misrepresentation by an advice to the other that he consult his professional advisers, or his friends, before concluding the agreement, he does not thereby counteract any effect upon the transaction which his untrue statement would otherwise produce.(2) Nor does even the sale of a thing "with all its faults," render the contract valid which might otherwise be impeached or defeated by means of the vendor's misrepresentations. Where this condition is a part of the agreement, the purchaser must take the subject-matter with all its defects, patent or latent; but the vendor is not protected against his false representations.(3)

SEC. 226. The general doctrine that a representation must be relied upon by the party receiving it, in order that it may be a sufficient ground for impeaching or defeating a contract, extends also to the assignment of an agreement which, as between the original parties, is affected by a misrepresentation. If a contract between A. and B., which, by reason of his own misrepresentations in making it, cannot be enforced by A. against B., is assigned by B. to a third person C., who

(1) *Wilson v. Short*, 6 Hare, 366, 377.

(2) *Reynell v. Sprye*, 1 DeG. M. & G. 660, 710; *Dobell v. Stevens*, 3 B. & C. 623.

(3) *Schneider v. Heath*, 3 Camp. 506; *Early v. Garrett*, 9 B. & C. 928; *Springwell v. Allen*, 2 East, 448, n. The case of *Harris v. Kemble*, 1 Sim. 111, 120; 5 Blyth (N. S.), 730, which came before the M. R., Sir J. LEACH, the Lord Chancellor LYNCHURST, and the House of Lords, is a very instructive discussion of the doctrine concerning misrepresentations. A contract relating to a theatre, made between the joint owners of it, for a sale of the share of one to the other. It was claimed that misrepresentations had been made as to the profits. These representations were based upon the books of accounts, which were open to both parties, and were justified by the accounts as they appeared. Sir J. LEACH, for these reasons, the statements being founded on accounts equally open to both parties, and being in accordance with the accounts as they appeared, held against the claim, and decided that they did not avoid the contract. This decision was right beyond all doubt, if the premises of fact were correct. Lord Chancellor LYNCHURST and the House of Lords, considering that the agreement was unquestionably procured by the representations, that they were made for the purpose of obtaining it—found as a fact that the accounts were not equally plain and understandable to both parties—on the contrary, they were purposely kept in such a manner, that the party not familiar with them could not get at their real condition and ascertain the true state of the business, without the aid of an expert accountant. They, therefore, held that the party had been misled and the contract was rescinded.

is in no such relations with the parties that he is affected by the original fraud, and to whom no false statements are made in procuring the transfer, the agreement thus assigned, if otherwise binding upon him, might be enforced against C.; at least its enforcement against him would not be hindered by A.'s original misrepresentation, since he had not acted upon its faith and credit.(1) Nor is there anything strange or inequitable in this conclusion, for fraud does not render contracts void, but simply voidable, and can be taken advantage of only by the persons defrauded, and their representatives and privies; the right to a remedy is personal.(2)

SEC. 227. *VI. Materiality of the representation.*—The last element of a misrepresentation, in order that it may be a ground for denying the remedy of specific performance—and this requisite belongs to it alike in the three other kinds of remedial proceedings—is its materiality. The statement of facts which it contains must not only be relied upon as an impelling cause of concluding the agreement, but it must also be so material to the interests of the party thus relying upon it, that he is actually prejudiced by its falsity; so material that its falsity renders it unconscionable in the one making the representation to enforce the contract.(3) The court, however, does

(1) *Smith v. Clarke*, 12 Ves. 477, 484.

(2) *Harris v. Kemble*, 5 Bligh (N. S.), 730, 751.

(3) See *Polhill v. Walter*, 3 B. & Ad. 114; *Flint v. Woodin*, 9 Hare, 618. In *Fellowes v. Lord Gwydyr*, 1 Sim. 63; 1 R. & My. 83, the defendant, the vendee, entered into the contract, as he supposed, with one B., being led by one A. to believe that he was contracting with B., as the principal, through the agency of A. acting on behalf of B. It turned out that A. was the real party in interest, and that the purchaser really contracted with him, and the contract sought to be enforced was his. The defendant alleged this misrepresentation as a defense. There was nothing proved from which it could be inferred that defendant would not have made a contract with A. himself, as the principal, on the same terms; nor was it shown that he had been put to any inconvenience or suffered any loss by reason of the misrepresentations; so the court held them immaterial and decreed a specific performance. *Morrison v. Lods*, 39 Cal. 381. In order to defeat the specific performance of a contract on the ground of plaintiff's misrepresentations, the defendant must show that he will suffer some damage by means of the misrepresentation if the decree is made against him. In *Wuesthoff v. Seymour*, 7 C. E. Green, 66, the vendor, in the negotiation which led to a contract of sale, falsely represented to the vendee that an alley on the premises was only a private right of way in a few persons, when in fact it was a public alley; a public highway; this false representation being set up as a defense to a suit for a specific performance brought by the vendor, the court held it not to be a defense; that the misrepresentation could not work any material injury to the defendant, since his rights of property were substantially the same in either case. This decision cannot, in my opinion, be supported on principle. The public easement is certainly a far heavier burden, a greater incumbrance, and more detrimental



not inquire with any care into the extent of the prejudice; it is sufficient if the party who has been misled is very slightly prejudiced, if the amount is at all appreciable.(1)

SEC. 228. If a representation, upon which an agreement has been entered into, is not only untrue but fraudulent, or if it contains any element of knowledge or intention, it forms a complete defense to an enforcement of the whole contract. The party who made it will not be allowed, against the objection of the other party, to waive the particular part of the contract to which the false statement relates, or with which it is concerned, and to obtain a specific performance of the remainder.(2) The language of the learned equity judge quoted in the note, clearly points to a misrepresentation which is fraudulent,

to the pecuniary value of the premises, than the private easement in favor of a few specified persons. One fact is a test of this difference. The purchaser might be able, by negotiation with the holders of the private right, to extinguish their easement; but he could not, by any private proceeding or negotiation, extinguish the public easement of the highway. In *Wells v. Millett*, 23 Wisc. 64, the defendant had contracted to convey to the plaintiff a piece of land in exchange for an interest in certain barges and a steamboat transferred to him, relying upon representations by the plaintiff as to the condition of the barges and the incumbrances on the steamboat; these representations proved to be false, and a specific performance, at the plaintiff's suit, was, therefore, refused.

(1) *Cadman v. Horner*, 18 Ves. 10.

(2) *Viscount Clermont v. Tasburgh*, 1 J. & W. 112, 119. In this case, Sir T. PLUMER, in deciding the point which was squarely presented, said: "There is no authority anywhere, no case where the court has, when misrepresentation was the ground of a contract, decreed the specific performance of it; and nothing would be more dangerous than to entertain such a jurisdiction. The principle upon which performance of an agreement is compelled, requires that it must be clear of the imputation of any deception. The conduct of the person seeking it must be free from all blame; misrepresentation, even to a small part only, prevents him from applying here for relief. The reason of this is obvious; if it be so obtained, the contract is void both at law and in equity. Where an agreement has been obtained by fraud, is the effect to alter it partially, to cut it down, or *modify* it only? No; it vitiates it *in toto*, and the party who has been drawn in is totally absolved from obligation. If so, what equity has the other party, who, by his conduct, has lost one contract, to call on the court, for his benefit, to make a new one? If the defendant were willing to consent to it, and to enter into a new agreement, it would be a different case; but if he refuses, if he insists that he is absolved from it, what equity can there be in favor of the other?" All this language plainly assumes that the representation is fraudulent; or, at least, that there was the *scienter*. It speaks of the contract being *void*, both at law and in equity, of its being obtained by fraud, of the necessity of the plaintiff's being free from *deception*, etc., etc., all which expressions are utterly incompatible with an innocent misrepresentation. See, also, *Cadman v. Horner*, 18 Ves. 10; *Boynton v. Hazelboom*, 14 Allen, 107; *Thompson v. Tod*, 1 Peters' C. C. 388.

which contains a *scienter*, and which avoids the agreement both at law and in equity, although the particular false statement in that case was found, as a fact, not to have been *wilful*. A representation, as we have seen, may prevent the specific enforcement of an agreement by a court of equity, although it was not intentionally false, although the party making it was innocent of any deception, and believed his statement to be true. To misrepresentations of this kind the reasoning of the court in the passages cited has no application, and there is no rule or principle of equity which in such a case prevents the partial enforcement of a contract which is divisible, or the specific execution of it with compensation in respect of its parts, incidents, or features which do not correspond with the description. All the cases of a specific performance with compensation or abatement from the price on account of some partial failure of the subject-matter to agree with the description—cases, in other words, of a partial defect where the thing has been described as free from defect—are illustrations and proofs of this statement. This is especially so where the untrue statement is confined to the quantity of the land sold or to the value of it, so that a proportionate deduction from the agreed price is easily made.<sup>(1)</sup> Of course, if the misrepresentation goes to

(1) See *Powell v. Elliott*, L. R. 10 Ch. 424, where vendors of a large colliery made misrepresentations as to the net income, and a specific performance with compensation—deduction from the price was decreed. The misstatement was not here held to be grossly fraudulent, but from the nature of the case, it is difficult to suppose that the real facts were not known. It went, however, to an incidental matter, and could easily be compensated by a simple and equitable adjustment of the price. *Whittemore v. Whittemore*, L. R. 8 Eq. 603; this was a serious misrepresentation—not intentional, so far as the case shows—as to the amount of land, and the agreement was enforced against the vendee with a corresponding abatement. In *Leyland v. Illingworth*, 2 DeG. F. & J. 248, where there was a misrepresentation—as held by the court concerning a water supply—the vendee was given the option of either being discharged from the contract or of completing it with an abatement. The court treated the untrue statement as destroying the obligation of the contract, although distinctly asserted that “no fraudulent or dishonest intention was imputed to any one.” Even where the misrepresentation is willful, intentional, with knowledge, so that the remedy of a rescission would be granted, still, as the contract is thereby made voidable and not void, the injured party may waive the right to a complete defeat of the contract, and may insist upon a partial specific performance with compensation for the defect, unless the case is one which furnishes no foundation for estimating the amount of the compensation. See, in addition to cases already cited in this note, the following illustrations: *Voorhees v. De Meyer*, 2 Barb. 37; *Woodcock v. Bennett*, 1 Cow. 711; *Masson’s Appeal*, 20 P. F. Smith, 26, 29; *Anthony v. Leftwich*, 3 Rand, 258; *Slaughter v. Tindle*, 1 Litt. 358; *McCorkle v. Brown*, 9 Sm. & Mar. 167; *Gibbs v. Champion*, 3 Ohio, 335; *Pratt v. Carroll*, 8 Cranch, 471.

the very essence of the bargain, if it concerns the substantial terms of the agreement, a specific performance with compensation is impossible. This would be the case where the untrue statement was as to the vendor's title to the whole property, or where it concerned the entire nature of the estate, as where land represented to be in fee was leasehold, or where it related to some minor feature, but that feature affected the whole subject-matter alike—and other similar instances.

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### SECTION XIII.

*The contract must be free from mistake.*

SECTION 229. In administering its remedy of specific performance, equity requires that the contract shall not only be, in general, legally valid, but that it shall be free from unfairness, hardship, fraud, or mistake. A mistake, therefore, when established according to its judicial signification, will prevent a court of equity from specifically enforcing the agreement; it may, also, constitute the basis for two other equitable remedies, that of rescission, and that of reformation or correction. The essential element of mistake is ignorance. It is distinguished from fraud, fraudulent representations, or fraudulent concealments, by the absence of knowledge, of what in the technical nomenclature of the common law, is called the *scienter*. A mistake, then, is some act, omission, misapprehension, or misunderstanding, connected with or relating to the contract, done or suffered by one or both the parties erroneously, but without intention, design, or knowledge.

SEC. 230. In the vast majority of instances, the contract affected by a mistake is written. In such cases, the error, if proved at all, must be proved by parol evidence; in fact, the very process of judicially establishing the mistake, will frequently, if not generally, consist in showing that the written agreement should be altered or modified, either by adding, or omitting, or varying some of its terms, by means of parol evidence; in other words, by a parol variation of its terms. In this manner the written contract is brought into a conformity with the agreement actually made by the parties. The question thus arises on the threshold of the discussion, whether this proceeding is possible? Do the general doctrines of evidence, and especially does the statute of frauds permit such an alteration of

written contracts? Although there have been a few conflicting authorities—a slight judicial protest—it is well established, both in England and in the United States, that the admission of parol evidence to modify or vary written agreements, on the ground of their mistake, is an exception to the general rules of evidence; and that the statute of frauds does not prohibit the use of parol evidence in order to defeat the specific enforcement of a written contract affected by mistake, and even in order to correct the mistake itself, since the parol evidence is not employed in such cases for the primary object of proving an agreement in the first instance, but for the purpose of defeating an equity which otherwise arises from a contract made through mistake.(1)

(1) As to the statute of frauds, *Clark v. Grant*, 14 Ves. 519. In *Marquis Townshend v. Stangroom*, 6 Ves. 328, 333, Lord ELDON stated the doctrine, and the reasons for it, as follows: "It cannot be said that, because the legal import of a written agreement cannot be varied by parol evidence intended to give it another sense, therefore, in equity, when once the court is in possession of the legal sense, there is nothing more to inquire into. Fraud is a distinct case, and perhaps more examinable at law; but all the doctrine of the court as to cases of unconscionable agreements, hard agreements, agreements entered into by mistake or surprise, which, therefore, the court will not execute, must be struck out, if it is true that because parol evidence should not be admitted at law, therefore, it shall not be admitted in equity upon the question whether admitting the agreement to be such as at law it is said to be, the party shall have a specific execution, or be left to that court in which, it is admitted, parol evidence cannot be admitted." In *Clinan v. Cooke*, 1 Sch. & Lef. 21, 39, Lord REDESDALE summed up and condensed the whole argument and doctrine into one epigrammatic statement: "No person shall be charged with the execution of an agreement, who has not, either by himself or his agent, signed a written agreement; but the statute does not say that if a written agreement is signed, the same exception shall not hold to it that did before the statute." That the case of mistake is excepted from the general doctrine of evidence which forbids the variation of written instruments by parol, see *Peterson v. Grover*, 20 Me. 363; *Goodell v. Field*, 15 Vt. 448; *Chamness v. Crutchfield*, 2 Ired. Eq. 148; *Harrison v. Howard*, 1 Ired. Eq. 407; *Gibson v. Watts*, 1 McCord Eq. 490; *Blanchard v. Moore*, 4 J. J. Marsh. 471; *Huston v. Noble*, 4 J. J. Marsh. 130; *Anderson v. Bacon*, 1 A. K. Marsh. 48; *Perry v. Pearson*, 1 Humph. 431; *Van Ness v. City of Washington*, 4 Pet. 232. For some further instances in which the doctrine as to the effect of mistake has been announced or applied, see *Margraff v. Muir*, 57 N. Y. 155; *Patterson v. Bloomer*, 35 Conn. 57; *Lawrence v. Staigg*, 8 R. I. 256. In *Conover v. Wordell*, 5 C. E. Green, 266, it was said that a vendee who sued for a specific enforcement of the contract would not be prevented from obtaining the relief by his having already accepted a deed of conveyance purporting to be in performance of the agreement, where such acceptance was done under a mistake, on his part, as to the contents and effect of the deed. Surprise is also a ground for defeating a specific performance. *Willan v. Willan*, 16 Ves. 72; 19 Ves. 590; 2 Dow. 275; *Twining v. Morrice*, 2 Bro. C. C. 326; *Mason v. Armitage*, 13 Ves. 25. See, also, on the general doctrine of defeating a specific

SEC. 231. Mistake may be concerning the subject-matter of the contract or concerning its terms. In the first case, the terms of the contract are drawn up according to the intention of both the parties, but there is an error in respect of the thing to which these terms apply; as, for example, in respect of the amount, value, situation, title, boundaries, or other features of the land intended to be sold. Such a mistake may occur in a verbal as well as in a written agreement. In the second case, the mistake generally occurs in reducing the contract to writing, in adding, omitting, or changing some term; although it is, of course, *possible* that the parties should fall into an error in the original formation of a provision of their agreement, while their negotiation and conclusions are still verbal; but such an error will, in the majority of instances, be a mistake or misconception, as to the *legal* effect and import of the term, and not as to the language or form of the stipulation. The effect of a mistake may largely depend upon the party who made it. In this respect, mistakes are divided into three classes: 1. Those made by the defendant in the suit whatever be its nature or object. 2. Those made by the plaintiff in the suit. 3. Those which are mutual, or into which both parties have alike fallen. Again, mistakes may give rise to three entirely distinct equitable remedies or remedial rights, and their effects in creating these rights must be most carefully distinguished. They may avail: 1. As a defense in suits for the specific performance of the contracts, defeating such relief. 2. As a ground for rescinding the contract. 3. As a ground for reforming or correcting the contract. The two latter are beyond the scope of this treatise, and will only be incidentally touched upon, except in the single case where the reformation of an erroneous agreement, at the demand of the plaintiff, is combined with his suit for its specific performance when reformed. In the further discussion of the subject, I shall pursue the following order: 1. What mistakes can be made the ground either of relieving a defendant from the performance of a contract or of the affirmative remedy of rescission or reformation. 2. Mistakes set up by defendant as a ground for defeating the plaintiff's remedy, and herein incidentally of rescission and reformation. 3. Mistakes set up by

performance by parol proof of a mistake in the agreement, *Bradbury v. White*, 4 Greenl. 391; *Rogers v. Saunders*, 16 Me. 92; *Quinn v. Roath*, 37 Conn. 16; *Canterbury Aqueduct Co. v. Ensworth*, 22 Conn. 608; *Best v. Stow*, 2 Sandf. Ch. 298; *Ryno v. Darby*, 5 C. E. Green 231; *Chambers v. Livermore*, 15 Mich. 381; *Pendleton v. Dalton*, Phill. Eq. (N. C.) 119; *Morganthau v. White*, 1 Sweeney, 395; *White v. Williams*, 48 Barb. 222.

plaintiff as a ground for reforming the contract, and the enforcing it as reformed.

SEC. 232. *First. What species of mistakes are available as the occasion of equitable relief, either defensive or affirmative. I. The mistake must be concerning a matter of fact, and not merely concerning the law.*—The general rule is established by a strong preponderance of authority, although not without a contrary opinion expressed by able judges in numerous decisions, that a mistake, in order to be available for any purpose, must be one of fact; must concern some matter of fact connected with the subject-matter; that is, must be in reference to some one or more of the particulars mentioned in the preceding paragraph; and that in pursuance of the maxim *ignorantia legis non excusat*, neither an ignorance of the law, nor a mistake in the law affecting a contract, will, of itself, be a ground for denying its specific performance,(1) nor for its rescission.(2) By virtue of this principle neither party to a contract can allege, as the reason for any relief, negative or affirmative, that he or that both misunderstood, or were mistaken, or misinformed, or ignorant, as to the legal meaning and effect of any term, or of the agreement as a whole; nor that the legal meaning and effect of the contract, or of any provision, are different from what was intended and supposed; *provided the terms themselves—the language of the provisions and the subject-matter to which they relate—are the same which they were designed to be, and to which their minds had consented as the result of their negotiation.*(3) This limitation should be carefully observed, for upon it depends the entire doctrine respecting mistakes as to the legal effect of contracts, and the distinction between such errors, and those concerning facts. The rule is, of course, confined to cases of pure and simple mistakes, unaccompanied by any other inequitable circumstances. If the ignorance of one party, or his mistaken view of a

(1) Pullen v. Ready, 2 Atk. 587; Gibbons v. Caunt, 4 Ves. 849, per Lord ALVANLEY; Stockley v. Stockley, 1 V. & B. 23, 30; Mildmay v. Hungerford, 2 Vern. 248. In Patterson v. Bloomer, 35 Conn. 57, a specific performance was refused against a vendor of a contract, which he had made under a mistake as to the effect of the laws of another state where the land was situated; since the law of a country or state other than that of the forum is treated by the court as a *fact*.

(2) Marshall v. Collett, 1 Y. & C. Ex. 232, 238; Cockerell v. Cholmeley, 1 R. & My. 418.

(3) For example, where the parties made reciprocal written agreements to sell land to each other, which were not in their legal effect dependent, it could not be shown that the parties intended them to be dependent. Croome v. Lediard, 2 My. & K. 251. Where a written agreement gave a lessee an option as to the length of his lease, evidence that the parties did not intend such an effect was inadmissible. Price v. Dyer, 17 Ves. 356.

legal rule, has been taken advantage of by the other as the occasion for misrepresentation, concealment, undue advantage, overreaching, or other like means of imposition, it is a circumstance of great weight, and might easily induce a court to rescind a contract, or refuse to enforce it, although the misstatement, concealment unfairness, or other similar incident might not, perhaps, have been sufficient, of itself, to warrant such judicial action.

SEC. 233. *Mistake of law.*—The doctrines concerning mistake of the law, with their limitations and exceptions, are so important that they demand a separate discussion. Such mistake may be made by one or by both of the parties. In either case it may consist of ignorance or misapprehension concerning the legal effect and operation of the instrument as a whole, or concerning the legal effect of some particular provision. The general rule is well settled that, in the absence of special circumstances, a mistake of law in either of these forms, is not a ground for relief. If there were no elements of fraud, concealment, misrepresentation, or undue influence, a party who knew or had an opportunity to know the contents of a written instrument, cannot, in general, defeat its performance, or obtain a reformation because he or both mistook its legal meaning and effect, or the legal meaning and effect of any of its provisions. This is the general doctrine, as established by a great weight of authority, although it is subject to some limitations and apparent exceptions.(1) On the same principle and under the same limitations a mistake, as to the legal effect of an agreement, or as to the legal results of an act, cannot avail to defeat a specific performance.(2)

(1) *Mellish v. Robertson*, 25 Vt. 608; *Beardsley v. Knight*, 10 Vt. 185; *Goodell v. Field*, 15 Vt. 448; *Pettes v. Bank of Whitehall*, 17 Vt. 434; *Haven v. Foster*, 9 Pick. 112; *Wheaton v. Wheaton*, 9 Conn. 96; *Shotwell v. Murray*, 1 Johns. Ch. 512; *Lyon v. Richmond*, 2 Johns. Ch. 51; *Champlin v. Laytin*, 18 Wend. 409, per *Bronson, J.*; *Crosier v. Acer*, 7 Paige, 143; *Hall v. Reed*, 2 Barb. Ch. 500; *Dupree v. Thompson*, 4 Barb. 279; *Leavitt v. Palmer*, 3 N. Y. 19; *Bentley v. Whittemore*, 3 C. E. Green, 336; *Hawralty v. Warren*, 3 C. E. Green, 124; *Garwood v. Eldridge's Adm'r.*, 1 Green Ch. 145; *Wintermute v. Snyder*, 2 Green Ch. 489; *Light v. Light*, 9 Harris, 407; *Rankin v. Mortimore*, 7 Watts, 372; *Good v. Herr*, 7 Watts & Serg. 253; *Watkins v. Stocket*, 6 Har. & J. 445; *McEldery v. Shipley*, 2 Md. 35; *Showman v. Miller*, 6 Md. 479; *Alexander v. Newton*, 2 Gratt. 266; *Schmidt v. Labatut*, 1 Speer Eq. 421; *Dow v. Carter*, 1 Speer Eq. 414; *Dill v. Shahan*, 25 Ala. 702; *Parham v. Parham*, 6 Humph. 287; *Evants v. Strode*, 11 Ohio, 480; *McNaughten v. Partridge*, 11 Ohio, 223; *Martin v. Hamlin*, 18 Mich. 354; *Ruffner v. McConnell*, 17 Ill. 212; *Wood v. Price*, 46 Ill. 439; *Adams v. Robertson*, 37 Ill. 45; *Hunt v. Rousmanier*, 8 Wheat. 174; 1 *Peters*, 1; *Bank of U. S. v. Daniel*, 12 *Peters*, 32.

(2) *Powell v. Smith*, L. R. 14 Eq. 85; *Great West. Ry. Co. v. Cripps*, 5 Hare, 91.

SEC. 234. To this general doctrine there are important limitations; but it would not be strictly accurate to say that any well-founded and positive exceptions are acknowledged by the course of judicial decision, although such exceptions have been advocated by some courts with great ability. In the first place, the general doctrine does not go to the extent of asserting that, where the legal effect of a written contract has been confessedly or clearly mistaken or misunderstood by both the parties, equity will *never* interfere to deny a specific enforcement or to grant its affirmative relief.(1) When the parties, with knowledge of the facts, and without any inequitable incidents—such as fraud, misrepresentation, and the like—have made an agreement as both intended it should be, and the writing expresses such agreement as it was understood and designed to be made, then the general doctrine uniformly applies, and the agreement which the parties have thus made must stand. Equity will not reform it, nor refuse to enforce it, although one or both of the parties may have mistaken or misconceived its legal meaning, scope, and effect. But if, after making an agreement, in the process of reducing such agreement to a written form, the writing, by means of a mistake of the law, fails to express the contract which the parties actually entered into, equity will interfere to reform it or to prevent its enforcement, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. In this instance, there is no mistake as to the legal import of the contract actually made; but the mistake of law prevents the real contract from being embodied in the written instrument.(2) This limitation must, however, be kept within the principle on which it rests, which is, simply, that the intention of the parties should be carried into effect. The intention of the parties is the criterion. When parties have arrived at the agreement they intended to make, a court of equity will reform the written instrument, or refuse to enforce it, if, through a mistake, either of fact or of law, it fails to express that intention, to embody the contract which the parties designed to make. On the other hand, equity will not interfere and alter a contract so as to conform it with an intention *which the parties did not have when they entered into it*, but which they might, or even would have had, if they had been more correctly

(1) *Hunt v. Rousmanier*, 8 Wheat. 174, 216; *Snyder v. May*, 7 Harris, 235, 239; *Jones v. Monroe*, 32 Geo. 181.

(2) *Hunt v. Rousmanier*, 8 Wheat. 174; 1 Peters, 1; *Huss v. Morris*, 13 P. F. Smith, 367; *Clopton v. Martin*, 11 Ala. 187, *Stone v. Hale*, 17 Ala. 557; *Larkins v. Biddle*, 21 Ala. 252.



informed as to the law—if they had not been mistaken as to the legal scope and effect of their agreement. On the same ground, a court will not refuse a specific performance under such circumstances, so as to carry out an intention which did not exist when the contract was made.(1) If an agreement expresses the thought and intention which the parties had at the time and in the act of concluding it, no relief, affirmative or defensive, will be granted with respect to it, upon the assumption that their thought and intention would have been different, if they had not been mistaken as to the legal meaning and effect of the provisions by which such intention is embodied, even though it should be incontestibly proved that their intention would have been different if they had been correctly informed as to the law. But if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, either affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language employed in the writing. The instances in which this latter branch of the rule is ordinarily applied are those involving mistakes as to the legal effect of a description of the subject-matter, and as to the meaning and force of technical words and phrases.(2)

Sec. 235. There is one species of legal mistake which has been regarded by some of the decisions as resting upon equitable considerations which *may* withdraw it from the operation of the general doctrine, and which has given rise to much conflict of opinion among the courts and among text-writers. It is the case of an agreement made by a party in consequence of his mistaken belief, that some antecedent legal right is held by himself, or that some antecedent legal duty rests upon him, and designed in some manner to carry out such right, or to comply with such duty.(3) Of course, this particular case is plainly distinguishable from those of ordinary compromises and settlements, where all the parties, instead of ascertaining and enforc-

(1) *Hunt v. Rousmanier*, *supra*; *Marquis of Townshend v. Stangroom*, 6 Ves. 328, 332.

(2) The leading case in which both branches of this rule were exhaustively discussed is that of *Hunt v. Rousmanier*, *supra*. See, also, *Canedy v. Marcy*, 13 Gray, 373-377; *Stedwell v. Anderson*, 21 Conn. 139; *Gillespie v. Moon*, 2 Johns. Ch. 596; *Moser v. Libenguth*, 2 Rawle. 428; *Cook v. Husbands*, 11 Md. 492; *Springs v. Harven*, 3 Jones' Eq. 96; *Young v. Miller*, 10 Ohio, 85; *Clayton v. Freet*, 10 Ohio St. 544; *McNaughten v. Partridge* 11 Ohio, 223; *Worley v. Tuggle*, 4 Bush, 163; *Smith v. Jordan*, 13 Minn. 264.

(3) See *Marquis of Townshend v. Stangroom*, 6 Ves. 328, 332.

ing their mutual rights and obligations which are yet undetermined and uncertain, intentionally put an end to all possible controversy by a voluntary transaction in the way of compromise. There are decisions which hold that the party described in the particular case just mentioned, may be relieved from the contract or conveyance which he has thus erroneously made under a mistaken belief as to the legal relations in which he stood, and especially where the error consisted in the supposition that a legal duty rested upon him, compelling an execution of the contract.(1) This relief against mistake as to a party's legal relations, has sometimes been given by setting aside a contract entered into by way of compromise, when, through a misconception of a clear and settled legal rule, and an erroneous supposition that a legal duty rested upon him, whereas plainly no such duty existed, the party by means of his contract surrendered his property or other rights.(2) Relief, however, can only be given in such cases—and that it can be given at all is denied by high authority—when there was no doubt as to the antecedent legal rights and duties of the parties. If there was any uncertainty as to the existing facts at the time the agreement was made, or as to future events, or as to the rights and duties arising therefrom, a compromise must stand, however different the final issue may be from that which was anticipated.(3) This partial and limited relief in the case of compromises is entirely rejected by other judicial decisions, which hold that a compromise intentionally entered into can never be set aside or defeated, on the ground of a mistake as to the facts or the law upon which it was based, in the absence of fraud, concealment, or any other like inequitable incident.

SEC. 236. A distinction has been made by some able judges, and in some judicial decisions, between ignorance of the law and mistake of the law. It has been said that the maxim *ignorantia legis non excusat* should be confined to the mere ignorance of the law, which is purely

(1) *Lansdowne v. Lansdowne*, Moseley, 364; *Gross v. Leber*, 11 Wright, 520; *Cabot v. Haskins*, 3 Pick. 83. The case of *Lansdowne v. Lansdowne* has been frequently explained, questioned, doubted, and its authority denied. It has sometimes been said that the decision turned, not upon any mere mistake as to the legal duties and rights of the party, but upon circumstances of positive fraud and misleading, which, in connection with such a mistake, are always a sufficient ground for equitable relief.

(2) *Naylor v. Winch*, 1 Sim. & Stu. 555; *Brigham v. Brigham*, 1 Ves. 126; *Lansdowne v. Lansdowne*, Moseley, 364; and see *Willan v. Willan*, 16 Ves. 72; *Larkins v. Biddle*, 21 Ala. 252, 256; *Light v. Light*, 9 Harris, 407, 412.

(3) See cases of compromises cited *ante*, under § 178.

a negative condition of the mind—an absence of knowledge. While this theory admits that ignorance of the law is not, in itself, a sufficient ground for the interposition of courts, either affirmatively or defensively, it insists that a *mistake* of the law, which necessarily assumes some positive mental action, should be placed upon the same footing as a mistake of fact, and should be treated as a sufficient ground for relief, either by way of rescission, reformation, or a denial of specific enforcement, as the case may be.(1)

SEC. 237. Whatever be the effect of a mistake pure and simple, as to the legal meaning and operation of a contract or other instrument, there is no doubt that the equitable relief, affirmative or defensive, as the case may be, will be granted when the mistake of the complaining party with respect to the legal scope and meaning of the instrument is the direct result of misleading words, acts or conduct of the other party. It is a rule, both well settled and just, that where one party, although knowing the terms of a written agreement, is induced to enter into it by the misleading or incorrect statements of the other, concerning the legal meaning and effect of some provision, or of the entire contract, whether such misstatements are intentionally false or only innocently erroneous, a court of equity will reform the instrument at the suit of the party thus misled, or will rescind it when a reformation is impracticable, and, of course, will refuse to enforce its specific performance against the objection of such party.(2) Conduct, without words, may mislead a person in this respect, as completely as the most formal language, and will thus furnish ground for the same equitable relief.(3)

(1) This distinction has been acted upon by the court in some decisions, and approved by judges in other cases when, however, the decision did not turn upon it. *Lawrence v. Beaubien*, 2 Bailey, 623; *Hopkins' Executors v. Mazyck*, 1 Hill Eq. 250; *Lowndes v. Chisholm*, 2 McCord Eq. 455; and see *Champlin v. Laytin*, 18 Wend. 409, per PAIGE, senator; *Gilbert v. Gilbert*, 9 Barb. 534; *Arthur v. Arthur*, 10 Barb. 9; *Matthews v. Terwilliger*, 3 Barb. 50; *Dupree v. Thompson*, 4 Barb. 279; *Fitzgerald v. Peck*, 4 Litt. 125; *Lammot v. Bowley*, 6 Har. & John. 500; *Naylor v. Winch*, 1 S. & S. 555, per Sir JOHN LEACH.

(2) *Chestnut Hill Reservoir Co. v. Chase*, 14 Conn. 123; *Champlin v. Laytin*, 18 Wend. 407, 422; *Rider v. Powell*, 28 N. Y. 310; *De Peyster v. Hasbrouck*, 11 N. Y. 587; *Light v. Light*, 9 Harris, 407, 412; *Snyder v. May*, 7 Harris, 235; *Tyson v. Passmore*, 2 Barr, 122; *Broadwell v. Broadwell*, 1 Gilman, 599, 608; *Coger's Ex'ors v. McGee*, 2 Bibb, 321; *Phillips v. Hollister*, 2 Coldw. 269; *Cathcart v. Robinson*, 5 Peters, 264, 276.

(3) For example, when after the agreement is verbally concluded, one party offers to draw it up, and in doing so changes its legal effect, while the other, relying upon his knowledge and integrity, signs it under the assumption that the

SEC. 238. In all cases of relief, affirmative or defensive, founded upon mistake, and most emphatically when the mistake is one of law, the burden of proof rests upon the one alleging the error, and the evidence must be clear and convincing. The party asserting the mistake must not only show its existence by evidence of the most cogent nature, but his version of the transaction and explanation of the error must be reasonable and probable, so that the mind of the court shall be brought into as complete a condition of certainty as is possible in any judicial investigation. The complaining party must prove what was the real intent of the parties and the agreement which they actually made in pursuance of that intent, his own ignorance of the fact that the instrument in question, at the time of his signing it, did not express that intent, and that this ignorance was not the result of his own negligence or rashness.(1) Of course, the difficulty in respect to the proof will not exist whenever the instrument in suit is one which was to have been drawn up in pursuance of, or so as to carry out, some prior and existing writing or writings; for the court can then, upon a mere inspection and comparison of the two documents, detect any error in the later one, and can rectify it in accordance with the intent of the parties, so that it shall harmonize with the earlier one.(2)

SEC. 239 *II. Unexpected termination of compromises or speculative contracts.*—When parties have entered into a contract based upon uncertain or contingent events, purposely as a compromise of doubtful claims arising from them; or where parties have knowingly entered into a speculative contract, that is, one in which they intentionally speculated as to the result; and the facts upon which such agreement was founded, or the event of the agreement itself, turn out very different from what was expected or anticipated, this error, miscalculation, or disappointment, although relating to matters of fact and not of law, is not such a mistake, within the meaning of the equitable doctrine, as entitles the disappointed party to any relief either by way of defeating or rescinding the contract; in such classes of agreements

writing is a faithful expression of their contract; or where one party procures the scrivener to make the change, and keeps the other in ignorance thereof. See *Rider v. Powell*, 28 N. Y. 310; *Matthews v. Terwilliger*, 3 Barb. 50; *Snyder v. May*, 7 Harris, 235.

(1) *Lord Irnham v. Child*, 1 Brown C. C. 92; *Wheaton v. Wheaton*, 9 Conn. 96; *Demond v. Ins. Co.*, 5 R. I. 130; *Taylor v. Fleet*, 4 Barb. 95; *Scott v. Frink*, 53 Barb. 533; *Wood v. Patterson*, 4 Md. Ch. 335; *McMahon v. Spangler*, 4 Rand. 51; *Dupree v. McDonald*, 4 Dessau. 209; *Custard v. Custard*, 25 Tex. 49.

(2) *McKay v. Simpson*, 6 Ired. Eq. 452.

the parties are supposed to calculate the chances, and they certainly assume the risks.(1)

SEC. 240. *III. Mistake must be material.*—The fact concerning which the mistake is made must be material to the contract, affecting its substance. A mistake by both of the parties in reference to some fact which, though connected with the agreement, is merely incidental, and not a part of its subject-matter, or essential to any of its terms, will be disregarded; will not constitute a sufficient ground for preventing a specific performance, or for a rescission or reformation.(2)

SEC. 241. *IV. An intentional act or omission cannot be a mistake.*—If the parties to a written contract have knowingly and intentionally drawn it so that it does not express the real agreement which they have made—as, for example, where the writing was purposely drawn so that certain terms of their actual agreement were omitted—no affirmative relief will be granted on the ground of mistake, for there can be no mistake in an act knowingly and intentionally done.(3) But

(1) See *Harris v. Loyd*, 5 M. & W. 432; and cases cited *ante*, under § 178, under the head of “Hardship.” See *Jeffreys v. Fairs*, L. R. 4 Ch. D. 448; *Stanton v. Tattersall*, 1 Sm. & Gif. 529; *Mellers v. Duke of Devonshire*, 16 Beav. 252; *Jennings v. Broughton*, 17 Beav. 234; *Colby v. Gadsden*, 34 Beav. 416; *Ridgway v. Sneyd*, Kay, 627; *Haywood v. Cope*, 25 Beav. 140.

(2) *Okill v. Whittaker*, 1 DeG. & Sm. 83; 2 Phill. 338. The plaintiffs had assigned a leasehold interest, and both parties were mistaken as to the time the lease had to run, supposing it to be less than it actually was, so fixed the price of the sale at a smaller amount than it otherwise would have been. On finding out the mistake the vendors brought this suit, praying that the vendees should be compelled to reassign the balance of the time over and above that which had been supposed. V. C. KNIGHT-BRUCE, however, held that the lease was the subject-matter sold and the time it was to run was an incident; the mistake as to which should be disregarded; the vendors ought to have known the real condition, etc., and so denied any relief. See, also, *Penny v. Martin*, 4 Johns. Ch. 566; *Trigg v. Reade*, 5 Humph. 529; *Story Eq. Jur.* § 141.

(3) *Lord Irnham v. Child*, 1 Bro. C. C. 92; *Lord Portmore v. Morris*, 2 Bro. C. C. 219; *Hare v. Shearwood*, 3 Bro. C. C. 168; 1 Ves. 241; *Pitcairn v. Ogbourne*, 2 Ves. Sen. 375; *Cripps v. Jee*, 4 Bro. C. C. 472. In *Marquis Townshend v. Stangroom*, 6 Ves. 322, where the parties had intentionally omitted a certain proviso from a written contract, and afterwards a suit was brought to correct it by inserting that provision, Lord Eldon said: “The parties desired the court not to do what they intended, for the insertion of that proviso was directly contrary to their intention, but they desired to be put in the same situation as if they had been better informed, and consequently had a contrary intention.” *Story Eq. Jur.* § 113. In the absence of fraud, such a term cannot be proved for the purpose of being enforced. Nor, as a general rule, can a writing be varied or contradicted by proof of a verbal stipulation made at the same time, and omitted on the faith of an assurance that it should be as binding as though incorporated with the written agreement. There being no fraud or mistake in the omission of

a court of equity will prevent one party from using such a contract in a manner that would operate as a fraud upon the other, and where such a fraudulent use is attempted and would be consummated without its interposition, the court will interfere, and, if necessary, set aside the imperfect agreement.(1)

SEC. 242. *V. Subsequent parol change of a written contract.*—A subsequent parol agreement between the parties, modifying their prior written contract, when set up by either plaintiff or defendant, does not fall within the principles of mistake. To vary a written contract in this manner without any element of fraud or mistake, is, in general, forbidden by the Statute of Frauds. The subsequent verbal alteration of a written agreement will be enforced in equity whenever a refusal

the provision from the writing, the enforcement of it, by means of parol proof, would introduce, it is said, all the evils and dangers which the rules as to written evidence were designed to prevent. See *Stevens v. Cooper*, 1 Johns. Ch. 425; *Dwight v. Pomeroy*, 17 Mass. 303; *Towner v. Lucas*, 13 Gratt. 705; *Broughton v. Coffey*, 18 Gratt. 181; *Knight v. Bunn*, 7 Ired. Eq. 77; *Westbrook v. Harbeson*, 2 McCord Eq. 112; *Ware v. Cowles*, 24 Ala. 446; *Thomas v. McCormack*, 9 Dana, 108. While this doctrine forbids the proof of the verbal stipulation intentionally omitted, for the purpose of adding it to the writing and enforcing the whole agreement thus vesting partly in writing and partly in parol, it does not go to the extent of denying to the party for whose benefit the verbal stipulation was made, the right of proving the existence of such verbal stipulation by way of defense, and to prevent the enforcement of the terms contained in the writing alone, which, if permitted, might be a gross fraud upon him. In several of the states the doctrine that the contemporaneous verbal stipulation on the faith of which the written contract was entered into cannot be proved and enforced, is wholly rejected; and the contrary rule is established, that such a parol stipulation may be proved and specifically enforced, the written contract, if necessary, being reformed by a decree of the court so as to embrace the omitted term. It is said, with great force of reasoning, that the refusal to abide by such an agreement, and the attempt to compel a performance of that portion alone of the entire contract which is contained in the writing, is of itself a fraud or unrighteous dealing which calls for the remedial action of the equity courts. It is so held in *Murray v. Dake*, 46 Cal. 644; *Taylor v. Gilman*, 25 Vt. 411; *Cogers' Ex'ors v. Magee*, 2 Bibb, 321, and in a series of Pennsylvania cases; *Oliver v. Oliver*, 4 Rawle, 141; *Rearich v. Swinehart*, 1 Jones, 233; *Renshaw v. Gans*, 7 Barr. 119; *Campbell v. McClenachan*, 6 S. & R. 171; *Miller v. Henderson*, 10 S. & R. 290; *Clark v. Partridge*, 2 Barr, 13; 4 Barr. 166.

(1) *Jervis v. Berridge*, L. R. 8 Ch. 351. The decision in this important case shows that while such a contract cannot be reformed so as to make it include the omitted verbal stipulations, the court will not permit one party to enforce the written portion alone while repudiating the terms which had been left out of the writing, and thus to perpetrate a fraud; it will, therefore, rescind, or allow the party himself who has been thus deceived, to rescind the whole agreement. And see, *Murray v. Dake*, 46 Cal. 644; *Quinn v. Roath*, 37 Conn. 16; and other cases cited in the last note.

to comply with it would be a fraud; and a subsequent parol waiver or abandonment of a written contract, or the subsequent substitution of a different verbal agreement in its stead, may prevent the enforcement of the original contract, although it be one required by the Statute of Frauds to be in writing.(1)

(1) *Price v. Dyer*, 17 Ves. 356, 364, per Sir Wm. GRANT. The parties had made a written contract, and afterwards entered into a parol agreement by which the first was abandoned and different terms adopted. It was held that the second agreement was not designed as a waiver of the first, but as a modification of or addition to its provisions; and as it had not been acted upon—no part performance—it was no defense to the first, and the original contract was therefore enforced. In *Jordan v. Sawkins*, 3 Bro. C. C. 388; 1 Ves. 402, A. agreed in writing to give a lease to B., to commence on the 21st of April, being merely an agent of one C.; afterwards A. & C. verbally agreed that the lease should commence on the 24th of June, and be made to C. directly instead of to B. C. & B. sued for a specific performance of the written contract as altered by the verbal agreement; and it was held that the statute of frauds prevented. *Inge v. Lippingwell*, 2 Dick. 469; *Rich v. Jackson*, 4 Bro. C. C. 519; *Filmer v. Gott*, 2 Ves. 401, n.; *Coles v. Trecothick*, 9 Ves. 250; *Robinson v. Page*, 3 Russ. 119; *Legal v. Miller*, 2 Ves. 299; *Ryno v. Darby*, 5 C. E. Green, 231, a written contract will not be specifically enforced if there has been a subsequent parol agreement to abandon it and to substitute another in its place; and in *Bowman v. Cunningham*, 78 Ill. 48, it was held that a mutual abandonment by verbal agreement of a written contract prevented its enforcement in equity. In *Ewing v. Gordon*, 49 N. H. 444, it was held that the time for making payments as provided in a written contract for the sale of land, may be extended by a subsequent verbal agreement between the parties, and that the benefit of such arrangement would enure to the vendee's assignee; but in *Lombard v. Chicago Sinai Congregation*, 75 Ill. 271, it was said that the time for the payment of installments past due could not be thus extended by mere verbal promises. Some of the earlier English cases denied that a parol waiver of a written contract for the sale of land was a good defense *in equity* to a specific performance, for the reason that such a contract created an equitable estate in the vendee, and this estate could not be assigned or surrendered by the vendee under the statute of frauds unless by a contract in writing. *Buckhouse v. Crossby*, 2 Eq. Cas. Abr. 32, pl. 44, per Lord HARDWICKE; *Bell v. Howard*, 9 Mod. 205; *Parteriche v. Powlet*, 2 Atk. 383. But, as stated in the text and as appears by the cases cited at the commencement of this note, the doctrine is now settled that such a waiver defeats the enforcement in equity as well as at law; this is the rule also in the United States. *Buel v. Miller*, 4 N. H. 196; *Walker v. Wheatly*, 2 Humph. 119; *England v. Jackson*, 3 Humph. 584; *Botsford v. Burr*, 2 Johns. 416; *McCorkle v. Brown*, 9 Sm. & Mar. 167; *Tolson v. Tolson*, 10 Mo. 736. In Pennsylvania, however, this doctrine is only admitted to a partial extent and in a modified form. See *Goucher v. Martin*, 9 Watts, 106, 110; *Meason v. Kaine*, 13 P. F. Smith, 339; *Workman v. Guthrie*, 5 Casey, 495, 509; *Lauer v. Lee*, 6 Wright, 165; *Bowser v. Cravener*, 6 P. F. Smith, 132. Where a written agreement, instead of being waived or abandoned, is simply modified by a subsequent parol stipulation, and a suit is brought to enforce it either in its original form or with the modification, the defendant will be allowed to elect between the original written form of the contract and the form as verbally

SEC. 243. *Second. Mistake, when set up by a defendant to defeat a specific performance demanded by the plaintiff; and herein incidentally of rescission or reformation of the contract. I. Where the mistake is made by the defendant alone.*—This subdivision will include cases of a mistake by the defendant, without any relation to the form of the contract, whether written or verbal. The mistake itself will generally concern the subject-matter. The succeeding subdivision will embrace the cases where the defendant seeks to modify the terms of a written agreement, on account of a mistake made by one or both the parties.

SEC. 244. 1. *Where defendant's mistake was induced or facilitated by the acts of the plaintiff.*—Whenever the defendant, against whom a specific performance is asked, has fallen into a mistake, which the plaintiff, by his acts or omissions, either intentionally or unintentionally, induced or made probable or even possible, or to which the plaintiff contributed, such error, by the plainest principles of equity, prevents an enforcement of the agreement.(1) The position of the defendant,

modified; and in default of any such election by him a specific performance will be decreed of the contract in writing. *Robinson v. Page*, 3 Russ. 114; *Price v. Dyer*, 17 Ves. 358.

(1) *Denny v. Hancock*, L. R. 6 Ch. 1. Action for a specific performance brought by the vendor. A dwelling-house and grounds were put up for sale; the plan of the premises showed the west side bounded by a mass of shrubs and trees. Defendant went with the plan in his hand and inspected the property, and found on the west side a mass of shrubs, and on the outside of this, just beyond it to the west, an iron fence, which appeared to be the boundary of the place, and which included three magnificent trees. Believing that this iron fence was the boundary, he bought the property at the auction sale. He then discovered that the boundary really ran through the midst of the shrubbery, marked by stumps or posts which were concealed by the shrubbery, while the iron fence and the three fine trees were on other land. The plan represented detached trees, but not these trees. It was admitted that these three trees were a material element in the value of the dwelling, and, in fact, the belief that they belonged to it was one of the main reasons which determined the defendant to buy it. *Held*, by the LL. JJ., reversing the decision of V. C. MALINS, that the purchaser would naturally suppose the iron fence to be the boundary; that there was nothing in the plan or other circumstances to put him on the inquiry; that he had been misled into the error by the fault of the vendor in not describing the place with more accuracy, and even in misdescribing it on the plan, so far as it went; and a specific performance was refused. It was said, per MELLISH, L. J., that the difference between the true and the apparent boundaries ought to have been shown on the plan, and also mentioned in the description; also that, as long as the vendee had a good ground for refusing to complete, the court had nothing to do with his real motives lying behind such ground, if there were any—whether his *real* objection was the want of the trees or something else—was a matter with which the court had no concern. See, also, *Weston v. Bird*, 2 W. R. 145; *Swaishland v. Dearsley*, 29 Beav. 430. *Baskcomb v. Beckwith*, L. R. 8 Eq. 100, per Lord ROMILLY, M.



under the circumstances, is quite analogous to that of one who has been influenced by the plaintiff's false misrepresentations, although it is by no means necessary that the plaintiff's acts should, of themselves, in the absence of the defendant's mistake, be sufficiently misleading to defeat all relief. If a mistake, by the defendant, as to the legal meaning and effect of an agreement, is clearly proved to have been caused by the plaintiff's misrepresentations or misguiding statements, it will, according to the doctrine of some decisions, be a sufficient ground for defeating the contract;(1) but the *ratio decidendi*, in

R. When defendant has contracted under a mistake, to which the plaintiff has, by his acts, *even unintentionally* led, a specific performance will not be enforced. Suit by vendor against the purchaser. The owner of an estate put up the whole of it (except a small piece) for sale in lots, subject to a condition that no public house should be built, and no trade carried on, on the property. This condition was intended to protect purchasers by making the lots suitable for first-class residences, the property being in the near vicinity of a large city. In the particulars, the property thus advertised for sale was described as the "M— Estate," and there was nothing to show that any part of it was excepted. In fact, a small piece *was* excepted. Defendant not knowing of any such exception, and supposing from the said papers that there was no exception, and that the whole of the vendor's estate would be subject to the said condition, bought a lot consisting of a mansion house, which was situated only one hundred yards from the piece which was actually excepted. This piece was so located, with reference to roads, that it would be a very favorable site for a public house as a place of resort from the city, and it seems to have been assumed that it was excepted for this very purpose. Defendant, on discovering the fact, refused to complete, unless the vendor would enter into the same restrictive covenant with respect to the excepted piece, which the vendor would not do. *Held*, that defendant having purchased under a material mistake induced by the plaintiff's own acts, could not be compelled to complete, unless the plaintiff would covenant as above mentioned. See *Webster v. Cecil*, 30 Beav. 62. At an auction sale, the plaintiff led the defendant—the vendor—to believe that he should not bid; the seller was thus thrown off his guard, and the land was, by a misunderstanding of a person employed to make a reserved bid on behalf of the owner, suffered to be bid off by the plaintiff; although there was no fraud, the defendant's mistake, brought about to a great extent by the plaintiff's conduct, was held to be a sufficient ground for refusing an enforcement. *Mason v. Armitage*, 13 Ves. 25; *Pym v. Blackburn*, 3 Ves. 34. In *Higginson v. Clowes*, 15 Ves. 516, land was sold in lots. The particulars said that the timber on lots four and five was to be taken at a valuation; one of the conditions added, without any reference to any single lot or lots, but speaking in general terms, that the purchaser was to take the timber at a valuation. *Held*, by Sir Wm. Grant, that the special language concerning lots four and five, was likely to mislead a purchaser as to the meaning of the conditions; and assuming that the conditions, properly construed, applied to all the lots, it would be unjust to compel a purchaser to perform. See, also, *Doggett v. Emerson*, 3 Story, 700; *Rider v. Powell*, 28 N. Y. 310; *Matthews v. Terwilliger*, 3 Barb. 50.

(1) *Broadwell v. Broadwell*, 1 Gilman, 599; *Drew v. Clarke, Cooke*, 374.

such a case, is, strictly speaking, the fraud of the plaintiff, and not the mistake of the defendant.

SEC. 245. 2. *Where the mistake is solely due to the defendant.*—It is not necessary, however, that the defendant's error should, to any extent, be referable to the conduct of the other party. A mistake, which is entirely his own act or omission, or that of his agent, and for which the plaintiff is not in the least responsible, will defeat the relief of specific performance.(1) There is nothing inequitable in this rule.

(1) A court of equity would even grant the affirmative relief of rescission or reformation, against the effects of a mistake which was wholly the act or omission of the complaining party, as in *Ball v. Storie*, 1 S. & S. 210, a lawyer was relieved at his own suit, from an error in his own deed, which he drew himself. The following are illustrations of the rule stated in the text. In *Malins v. Freeman*, 2 Keen, 25, an agent was employed to bid for a certain lot to be sold at an auction; coming into the sale-room, he heard the description of an entirely different parcel of land read, and the sale of that commencing, he went on bidding hastily and without examination or thought, but under the supposition grossly erroneous, that the lot being sold was the one for which he was employed to bid; it was finally struck off on his bidding, but a specific execution of the contract was refused. Here the mistake of the agent was imputable to the defendant, and although it resulted from gross laches on his part, it was held to be a good defense. In *Manser v. Back*, 6 Hare, 443, a vendor had revoked the authority of an auctioneer to sell a part of the land, but the auctioneer, through forgetfulness or inadvertence, sold the whole—although the purchaser supposed the agent was acting within the scope of his authority—and, in strict law, it seems that the agent had an *implied* authority to sell the whole, and bind his principal thereby to the purchaser, yet a specific performance was refused on account of the agent's mistake. This case certainly carries the rule to its extreme length, for it does not seem from the report that the error of the agent would have avoided the contract in law as against a purchaser who was ignorant of the agent's private instructions, and relied upon his general apparent powers. In *Leslie v. Thompson*, 9 Hare, 268, which was a suit to enforce a contract against the vendor, the vendor's solicitor had prepared a description of the land from a previous one, which had been drawn up by another attorney from a report made by a surveyor, and the land was contracted to be sold in conformity with such description; which, however, was found to be erroneous as to the quantity—whereupon the court refused to enforce against the vendor unless the purchaser would agree to a compensation. And see *Alvanley v. Kinnaird*, 2 McN. & G. 7, per Lord COTTENHAM; *Helsham v. Langley*, 1 Y. & C. C. C. 175; *Neap v. Abbott*, C. P. Cooper Rep. (1837-8) 333. In *Baxendale v. Seale*, 19 Beav. 601, a vendor contracted to sell an estate, not knowing its exact extent or the location of its boundaries, and both parties at the time having an erroneous supposition as to what was included in it; it was found to contain a very valuable property, which the vendor did not know was a portion of it; a specific performance was refused at the suit of the vendee. The case of *Howell v. George*, 1 Mad. 1, is noteworthy, since the mistake upon which the decision turned was purely one of law. A tenant for life, under a settlement of a certain property—the settlement contained a provision that if he should purchase another tract of land in some con-

The principle that a person may, by his own acts, furnish the grounds for defeating an obligation, which would otherwise rest upon him, is well established both in law and in equity; the effect of a party's voluntary intoxication is a familiar example—or of temporary insanity, like *delerium tremens*, brought about by excessive criminal indulgence.

SEC. 246. II. *Where the defendant seeks to modify the terms of a written contract on account of a mistake by one or both of the parties.*—In all the cases embraced within this subdivision the plaintiff sues to enforce a written agreement formally signed by the defendant, while the defendant, in resisting the application, alleges in the technical language of the decisions, “a parol variation”—that is, attempts to establish by parol evidence some modification of the writing, either on the ground that through the mistake of one or both the parties the written instrument does not accurately express the real contract originally entered into, or on the ground that the contract itself was originally made through the mistake of one or both the parties. This latter ground, where the mistake is alleged to have been by the defendant, is evidently the one treated of in the preceding subdivision, and the only question connected with it left for discussion is, how far can parol evidence be admitted in its support. The first ground—the failure of the writing to express the real agreement entered into by the parties—and a branch of the second, that the agreement was originally made through a mistake on the part of the plaintiff, have not yet been discussed.

venient place of value equal to or greater than that contained in his settlement, and should settle it in fee simple in accordance with the existing settlement, then the land comprised in the existing settlement should become his property absolutely. He supposed that this provision gave him, in concurrence with his wife, the absolute power of disposition over the settled estate, and therefore entered into a contract to sell it. The suit was brought by the purchaser to compel a specific performance. Now, although the vendor had not the power to sell which he supposed, yet it was possible for the court to work out the plaintiff's equity in a roundabout way. It could direct the vendor to buy another estate of proper value, and settle it in a proper manner, so as to take the place of the original one, and this could be done under the supervision of one of the masters. This being done, the vendor would be the owner of the first land, and able to perform his contract. The plaintiff asked the court to compel this proceeding; but the court, Sir T. PLUMER, refused to make such a decree, and relieved the vendor. See, also, *Western R. R. v. Babcock*, 6 Metc. 346; *Post v. Leet*, 8 Paige. 337. *Mortimer v. Pritchard*, 1 Bailey's Eq. 505, is somewhat different in respect to the mistake for which defendant can be relieved, holding that it must be one made under the influence of false appearances, and not merely from the operations of the party's own mind alone—in other words, it must be prompted by the plaintiff's acts or conduct. See, also, *Webster v. Cecil*, 30 Beav. 62; *Butterworth v. Walker*, 13 W. R. 168; *Moxey v. Bigwood*, 12 W. R. 811; *Park v. Johnson*, 4 Allen, 259.

SEC. 247. 1. *Where the written agreement fails to express the real contract.*—Where the plaintiff sues to enforce a written contract regularly and formally signed, and the defendant alleges and proves by parol evidence that the parties verbally entered a certain agreement, which was intended to be put into a written form, but that in reducing it to writing some error or mistake was made, overlooked at the time of signing the instrument, whereby the written contract in suit fails to express the real agreement of the parties as originally made, these facts will defeat the specific performance demanded by the plaintiff; and if the defendant goes on and clearly proves by his parol evidence that the written contract in suit modified or varied in the manner alleged by him, constitutes the original and true agreement made by the parties, the court may not only negatively reject the plaintiff's version, but may affirmatively adopt the version of the defendant, and decree a specific execution of the contract which he has alleged and proved. It cannot, perhaps, be said that the court is always bound to grant such affirmative relief to the defendant in the plaintiff's suit. Under the old chancery practice it would rather be discretionary with the court. Under the reformed procedure, however, which provides for the granting of affirmative relief either legal or equitable to defendants, and which has introduced the doctrine of legal and equitable counter-claim, such a decree, the facts being sufficiently proved, is a matter of course and of right.(1)

(1) In *Joynes v. Statham*, 3 Atk. 388, in a suit to enforce a written contract to give a lease at a certain annual rent, defendant alleged that the writing should have contained a provision to the effect that the plaintiff, the lessor, was to pay all the taxes, which had been omitted by mistake, and proved his allegations, Lord HARDWICKE, in granting a specific performance, carried out the defendant's contention by directing a covenant to that effect to be inserted in the lease. In *Fife v. Clayton*, 13 Ves. 546, when plaintiff sought the specific performance of a contract to sell an estate, and the defendant alleged and proved an important variation in the writing from the true agreement as originally made, the plaintiff thereupon offered to have his suit dismissed, but the court decreed a specific execution of the contract according to defendant's version, so that he would not be put to the trouble and expense of a cross-bill; and see *Gwynn v. Lethbridge*, 14 Ves. 585. In *Bradford v. Union Bk. of Tenn.*, 13 How. (U. S.) 57, the same decision was made, it being held that under such circumstances the defendant was entitled to a specific performance of the contract as alleged and clearly proved by him, varying, as it does, from the one set forth by the plaintiff, even when the plaintiff claimed to have his bill dismissed. See, also, *Wells v. Cruger*, 5 Paige, 164; *Ferussac v. Thorn*, 1 Barb. 44; *Bradbury v. White*, 4 Green Ch. (N. J.) 391; *Arnold v. Arnold*, 2 Dev. Eq. 467. In *McComas v. Easley*, 21 Gratt. 23, the power of the court to relieve the defendant was asserted, although the case is not a direct authority for the propositions contained in the text, since the contract sought to be enforced by the plaintiff was wholly verbal, and he

SEC. 248. *Reforming the contract in case of such a mistake.*—This species of mistake is the occasion for another equitable remedy, which, although not belonging to the purpose of this book, may be briefly noticed. Where the parties have verbally entered into an agreement without any error in reference to its subject-matter or its terms, but in putting it into a written form a mistake occurs common to both of them, and not perceived at the time of signing the instrument, whereby such writing fails to express the real agreement between them, this fact furnishes no ground for a rescission, because there is a subsisting agreement; but it furnishes a ground for the remedy of reformation or correction at the suit of either, whereby the written instrument shall be made to correspond with the actual agreement as originally made. In obtaining such relief, both the error and the correction to be made in the writing must, of course, be established by means of parol evidence.(1) The case described in the latter part

relied upon a part performance. There may be some analogy, however, between a contract in writing as required by the statute of frauds, and a verbal contract part performed so as to uplift the prohibition of the statute. The plaintiff alleged a certain verbal contract, and gave proof of part performance. Defendant set up in his answer, and proved on the hearing, a verbal contract considerably different in its terms from that asserted by the bill. The acts of part performance could be applied to either version, and in respect to them there was no substantial dispute. The court *held*, that it might either dismiss the suit, so that the plaintiff would be obliged to sue again upon the actual agreement, or might permit the plaintiff to elect to have the contract, as proved by the defendant, specifically enforced; that in such cases the court would, as a general rule, decree a specific performance of the contract as actually proved by the whole evidence. In *Quinn v. Roath*, 37 Conn. 16, the matter of proving verbal modifications by either party in a written contract, was thoroughly discussed; and the court *held*, that a plaintiff, enforcing a written contract for the sale of land, must accept the parol modifications of it which the parties had made; that plaintiff is not allowed the same indulgence in introducing parol evidence of such modifications that is given to the defendant, who defends against the contract in suit, and offers to show verbal stipulations varying or limiting it; that the defendant may also prove such verbal stipulations as have induced him to sign the contract. See, also, *Murphy v. Rooney*, 45 Cal. 78. See, also, *Martin v. Pycroft*, 2 DeG. M. & G. 785; *Winch v. Winchester*, 1 V. & B. 375; *Manser v. Back*, 6 Hare, 443; *Marquis of Townshend v. Stangroom*, 6 Ves. 328; *Vouillon v. States*, 2 Jur. (N. S.) 845; *Wood v. Scarth*, 2 K. & J. 33; *Barnard v. Cave*, 26 Beav. 253; *Webster v. Cecil*, 30 Beav. 62; *Price v. Ley*, 4 Giff. 235; 32 L. J. (N. S.) Ch. 530; *Patterson v. Bloomer*, 35 Conn. 57; *Best v. Stow*, 2 Sandf. Ch. 298; *Ryno v. Darby*, 5 C. E. Green, 231; *Chambers v. Livermore*, 15 Mich. 381; *Huntington v. Rogers*, 9 Ohio St. 511, 516.

(1) *Murray v. Parker*, 19 Beav. 305. In *Calverly v. Williams*, 1 Ves. 210, it was claimed by one side and denied by the other, that a certain seven acres were included in the land contracted to be sold, and ought to have been so expressed in the writing. Lord THURLOW said, that if the parties had mistaken each other,

of the preceding paragraph of enforcing performance of the contract as modified by the defendant's allegations and proofs, is merely a special instance of this general doctrine; since the court, then, actually reforms the written contract set up by the plaintiff, in accordance with the defendant's contention, and then enforces it as thus corrected. But the remedy is not confined to such suits, and is, in fact, generally granted at the demand of the plaintiff in actions brought for that express purpose.

one understanding one way and the other understanding the other way, the contract must be *rescinded*. "On the other hand, if both understood the whole was to be conveyed, it must be conveyed. But, again, if neither understood so—if the buyer did not imagine he was buying, any more than the seller imagined he was selling, this part—then the pretense to have the whole conveyed is as contrary to good faith upon his side as the refusal to sell would be in the other case." In *Henkle v. Royal Exchange Assurance Co.*, 1 Ves. Sen. 317, where the assured sought to reform a policy on account of a common mistake, so as to make the insurer liable for the loss, Lord HARDWICKE said: "No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts; so that if reduced into writing contrary to the intent of the parties, on proper proof, that would be rectified." See *Baker v. Paine*, 1 Ves. Sen. 456; 6 Ves. 336, n.; *Wooden v. Haviland*, 18 Conn. 101; *Chamberlain v. Thompson*, 10 Conn. 243; *Cook v. Preston*, 2 Root, 78; *Chapman v. Allen*, Kirby, 399; *Best v. Stow*, 2 Sandf. Ch. 298; *Alexander v. Newton*, 2 Gratt. 266; *Perkins v. Dickinson*, 3 Gratt. 335; *Webster v. Harris*, 16 Ohio, 490; *Pugh v. Chesseldine*, 11 Ohio, 109; *Willis v. Henderson*, 4 Scam. 13; *Wyche v. Greene*, 16 Geo. 49; *Rogers v. Atkinson*, 1 Kelly, 12; *Collier v. Lanier*, 1 Kelly, 228; *Clopton v. Martin*, 11 Ala. 187; *Mosby v. Wall*, 23 Miss. 81; *Parham v. Parham*, 6 Humph. 287; *Bellows v. Stone*, 14 N. H. 175; *Langdon v. Keith*, 9 Vt. 299; *Blair v. McDonnell*, 1 Halst. Eq. 327; *Firmstone v. DeCamp*, 2 C. E. Green, 317; *Waldron v. Letson*, 2 McCarter, 126; *Chew v. Gillespie*, 6 P. F. Smith, 308; *Gump's Appeal*, 15 P. F. Smith, 476; *Irick v. Fulton*, 3 Gratt. 193; *Brown v. Bonner*, 8 Leigh, 1; *Stone v. Hale*, 17 Ala. 557; *Larkins v. Biddle*, 21 Ala. 252; *Lauderdale v. Hallock*, 7 Sm. & Mar. 622; *Ross v. Wilson*, 7 Sm. & Mar. 753; *Wurzbarger v. Meric*, 20 La. An. 415; *Mattingly v. Speak*, 4 Bush, 316; *McCann v. Letcher*, 8 B. Mon. 320; *Mills v. Lockwood*, 42 Ill. 111; *McCloskey v. McCormick*, 44 Ill. 336; *Kuchenbeiser v. Beckert*, 41 Ill. 172; *Cleary v. Babcock*, 41 Ill. 271; *McDonald v. Starkey*, 42 Ill. 442; *Shively v. Welch*, 2 Oregon, 288; *Bradford v. Union Bank*, 13 How. (U. S.) 57, 66. It has often been said, that in order to grant the remedy of reformation the mistake must have been *mutual*. See *Lyman v. United States Ins. Co.*, 17 Johns. 373; *Nevius v. Dunlap*, 33 N. Y. 676; *Wemple v. Stewart*, 22 Barb. 154; *Lanier v. Wyman*, 5 Roberts, 147; *Cooper v. Farmers' Ins. Co.*, 14 Wright, 299. But this mode of stating the rule is not strictly accurate, since a reformation may be granted in favor of one party, who alone was mistaken, when his mistake was the result of the other's misleading conduct or language. *Rider v. Powell*, 28 N. Y. 310; *Matthews v. Terwilliger*, 3 Barb. 50; *Wiswall v. Hall*, 3 Paige, 313; *De Peyster v. Hasbrouck*, 1 Kern. 582. The true rule, as gathered from the decisions, is the following: Both parties must have entered into one and the same contract, each understandingly assenting to the same terms, and the written instrument must, without the knowledge of the

SEC. 249. It is well settled that in such case parol evidence is admissible to show the common mistake of both the parties in the written instrument and to supply the means of correcting it, whether for purposes of defense merely or of obtaining the affirmative remedy of a reformation.(1) In order, however, to overcome in this manner the inherent force of a written contract and to procure a variation of its terms, the parol evidence of the mistake and of the alleged modification must be clear and convincing; and, in the language of the decisions, "the strongest possible," or else the mistake must be admitted by the opposite party.(2) If an executed deed is to be corrected

party seeking relief, fail to express the real contract; must, in some way, depart from the terms to which the common assent had been given. In order that the doctrine of reformation should apply, it is absolutely essential that in making their original agreement, both parties should understand its terms and its subject-matter alike; that the minds of both should meet upon the same points. If the minds of both parties did not *cogree*—if one of them mistook or misunderstood one or more of the terms of the original contract—the remedy, if any, would be rescission and not reformation; for a reformation requires that the parties should have originally made a valid and binding contract, in accordance with which the court can *reform* the mistaken written instrument before it. *Henkle v. Royal Ex. Ins. Co.*, 1 Ves. Sen. 317; *Marquis Townshend v. Stangroom*, 6 Ves. 328; *Diman v. Providence R. R.*, 5 R. I. 130, 135; *Sawyer v. Hovey*, 3 Allen, 331; *Gillespie v. Moon*, 2 Johns. Ch. 595; *Tesson v. Atlantic Ins. Co.*, 40 Mo. 33; *Woodbury Savings B'k v. Insurance Co.*, 31 Conn. 517; *Coffing v. Taylor*, 16 Ill. 457; *Welles v. Yates*, 44 N. Y. 525. An erroneous description or designation of the subject-matter, or of some part thereof, whether made by the parties or by the scrivener, may be corrected. *Bradford v. Union B'k*, 13 How. (U. S.) 55; *Winnipisseegee, etc., Co. v. Perley*, 46 N. H. 83; *Gillespie v. Moon*, 2 Johns. Ch. 580; *Wiswall v. Hall*, 3 Paige, 313; *White v. Wilson*, 6 Blackf. 448; *Stewart v. Brand*, 23 Iowa, 477; *Young v. Coleman*, 43 Mo. 179; *Raines v. Calloway*, 27 Tex. 678; *Smith v. Jordan*, 13 Minn. 264. These general doctrines as to the remedy of reformation are, of course, applicable to all cases where either the defendant or the plaintiff in a suit for a specific performance seeks to have the contract reformed, and then specifically executed as thus corrected.

(1) *Lady Shelburne v. Lord Inchiquin*, 1 Bro. C. C. 341, per Lord THURLOW: "I think it impossible to refuse as incompetent parol evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all the parties."

(2) *Henkle v. Royal Exchange Ass. Co.*, 1 Ves. Sen. 317; *Willan v. Willan*, 16 Ves. 72; *Fowler v. Fowler*, 4 DeG. & J. 265; *Mortimer v. Shortall*, 2 Dr. & W. 363, 374; *Pitcairn v. Ogbourne*, 2 Ves. Sen. 375, 379; *Marquis Townshend v. Stangroom*, 6 Ves. 333, per Lord ELDON; *Vouillon v. States*, 25 L. J. Ch. 875; *U. S. v. Munroe*, 5 Mason, 572; *Lyman v. United Ins. Co.*, 2 Johns. Ch. 630; *Griswold v. Smith*, 10 Vt. 452; *Lyman v. Little*, 15 Vt. 576; *Preston v. Whitcomb*, 17 Vt. 183; *Cleavland v. Burton*, 11 Vt. 138; *Kennedy v. Umbaugh*, Wright, 327; *Gray v. Woods*, 4 Blackf. 432; *Triplett v. Gill*, 7 J. J. Marsh. 432; *Harrington v. Harrington*, 2 How. (Miss.) 701; *Hunt v. Rousmanier*, 1 Pet. 1; *Durant v. Bacot*, 2 McCarter, 411; *Hall v. Clagett*, 2 Md. Ch. 152; *Philpot v. Elliott*, 4 Md. Ch. 273; *Beebe v. Young*, 14 Mich. 136; *Tesson v. Atlantic Ins.*, 40 Mo. 33, 36.

by a writing which is offered in evidence, and a latent ambiguity arises from some phrase or provision of such writing, parol evidence is admissible to remove the ambiguity and thus perfect the required correction.(1)

SEC. 250. 2. *Mutual mistake as to the subject-matter*.—Where there is no pretense that the written instrument does not express the real contract as it was entered into, but the parties at the time of making their agreement, which was afterwards reduced to writing, were both laboring under a mistake concerning the subject-matter, the contract thus affected by such mistake will not be enforced. There is really no contract, for there was no intelligent consent. Performance will, therefore, be refused on the objection of the defendant, or the remedy of rescission will be granted at the suit of either party.(2) This is

(1) *Murray v. Parker*, 19 Beav. 305.

(2) *Jones v. Clifford*, L. R. 3 Ch. D. 779, 788, per HALL, V.C. Suit by vendor for a specific performance. The parties made a contract of sale by which it was agreed that it should be assumed that E. N. was in 1841 the owner, and that the vendee should not inquire beyond him for title. Both parties supposed that E. N. was the source of title, and both were equally mistaken. Before completion the defendant—the vendee—discovered that E. N. never was owner, but that he himself, the defendant, was the owner in fee, subject to a leasehold interest in the vendor, and refused to complete. The vendor sued to enforce—no fraud was pretended—a case of common mistake. *Held*, that as the mistake was common, defendant could raise the objection, and a specific performance must be refused. *Semble*, that even in case of a completed contract, relief will be granted against a common mistake without fraud. See a very full examination of authorities and discussion of the doctrine by V. C. HALL. In *Davis v. Shepherd*, L. R. 1 Ch. 410, the owner of land agreed to demise to A. the minerals *west* of a certain “fault” supposed to run through the land in a certain direction, the amount of land west of said “fault” being described as “supposed to be 83 acres or thereabouts.” He also, at the same time, agreed to demise to B. the minerals *east* of the same “fault,” the land east thereof being supposed to be 98 acres. The fault was afterwards found to run in such a manner that only eight acres of land was left *west* of it, and, of course, much more than 98 acres *east* of it. The question in the suit was whether B. was entitled to all the minerals *east* of the fault, although beyond the original 98-acre portion of the surface and within the said 83 acres. All the parties were equally mistaken as to the real course of the “fault.” *Held*, that B. was not thus entitled to such minerals outside of the 98 acres, although on the east of the fault. This case, although largely turning upon a question of construction, is a good illustration of a common mistake as to the subject-matter. See, also, *Harnett v. Baker*, L. R. 20 Eq. 50, a case of common mistake as to the title on account of which a specific performance was refused. In *Calverley v. Williams*, 1 Ves. 210, a vendee claimed that a certain seven acres was included in a contract of sale; that it was embraced in the advertisement, being therein described as in the possession of one G. The vendor insisted that he did not intend to include this piece of land, nor know that it was in possession of the said G. Lord THURLOW said: “No doubt, if one party thought he had purchased *bona fide*, and the other party thought he had not sold, that is a ground



a different case from that mentioned in the note under section 248. In that case the parties really agree as to the subject-matter, and the mistake consists in its description or designation in the writing; in *this* case there is no agreement with respect to it; the parties are in error concerning it from the beginning, so that their minds never meet.

SEC. 251. 3. *Mutual misunderstanding of the contract.*—If there is no pretense of an error in reducing the agreement to writing, nor any *common* mistake as to its subject-matter—that is, both parties laboring under the *same* misconception, but the defendant shows, by means of his parol evidence, that there was a *mutual misunderstanding*—or, in other words, that one party understood one thing and the other party another thing, in respect to the terms or the matters embraced within them, it is plain that, in such a case, there has been *no* meeting of minds on the same point, and the court will, on the defendant's objection, refuse a specific performance, without considering or deciding *which* of the two parties is right or reasonable in his version. It is the mere *fact* of a substantial disagreement which destroys the consent necessary to the existence of a binding agreement, and thus furnishes a defense;—which one of the parties is correct is wholly immaterial. Of course, the misunderstanding must be in reference to matters of fact and not a mere misconception as to a rule of law, or as to the legal effect of the contract, or of any term.<sup>(1)</sup> Even where it is

to set aside the contract, that neither party may be damaged; because it is impossible to say, one shall be forced to give that price for part which he intended to give for the whole, or that the other shall be obliged to sell the whole for what he intended to be the price of part only." In *Hitchcock v. Giddings*, 4 Price, 135, a contract was made for the sale of the remainder in fee after an estate tail; both parties were ignorant that the tenant in tail had suffered a recovery, and there was no remainder left—the contract was rescinded. In *Dale v. Roosevelt*, 5 Johns. Ch. 174; 2 Cow. 129, one party covenanted to pay an annuity, and in consideration conveyed land supposed to contain a coal mine; no coal mine being within the land, a collection of the annuity was perpetually enjoined. In *Marvin v. Bennett*, 8 Paige, 312, the subject was fully discussed, and it was held that equity would rescind in cases of mutual mistake in agreements of sale, when the subject-matter did not exist at all, or was so materially different from what it was supposed as to defeat the object of the purchase; and in *Lawrence v. Staigg*, 8 R. I. 256, it was held that a mutual mistake as to *quantity* was a sufficient ground for a rescission, and *a fortiori* for defeating a specific performance.

(1) In *Wycombe Ry. Co. v. Donnington Hospital*, L. R. 1 Ch. 268, the doctrine was stated that when one party proves that he understood the agreement in a different sense from the other, a specific performance will be refused, without considering whether or not the defendant's construction is a reasonable one. See, also, *Alvanley v. Kinnaird*, 2 McN. & G. 1; *Baxendale v. Seale*, 19 Beav. 601; *Helsham v. Langley*, 1 Y. & C. C. C. 175; *Manser v. Back*, 6 Hare, 443; *Malins v. Freeman*, 2 Keen, 25; *Ball v. Storie*, 1 S. & S. 210; *Leslie v. Thompson*, 9 Hare,

doubtful whether both parties understood the contract in the same manner, the relief of specific enforcement will be withheld, because courts of equity require a clear, certain, unquestionable case of right, before they will administer this special remedy.(1) The same decision will be made of a suit where defendant shows by his parol evidence that, for any reason, the agreement, as alleged by the plaintiff, ought not to be performed, but, at the same time, from any circumstances, it would be unfair or inequitable to adopt and enforce the version of the contract maintained by the defendant; in such a case, as affirmative relief cannot equitably be given to either, the only alternative is a dismissal of the plaintiff's suit.(2)

SEC. 252. 4. *Mistake by the defendant alone.*—Where it appears from the parol evidence offered in defense, that the defendant alone was mistaken; that the contract was entered into by him under a mistake, the court has a discretion either to deny a specific performance entirely, or to enforce the agreement as modified in accordance with the defendant's contention; in other words, to adopt the defendant's version and decree its specific execution. This discretion is usually exercised by giving the plaintiff his option either to have his suit dismissed, or to have a performance of the contract as varied by the defendant's evidence.(3) In analogy to this sale, or rather as a par-

268; *Swaishand v. Dearsley*, 29 Beav. 430; *Webster v. Cecil*, 30 Beav. 62; *Clowes v. Higginson*, 1 V. & B. 524; *Gillespie v. Moon*, 2 Johns. Ch. 595; *Sawyer v. Hovey*, 3 Allen, 331; *Diman v. Providence R. R.*, 5 R. I. 130, 135; *Woodbury Savings B'k v. Insurance Co.*, 31 Conn. 517; *Tesson v. Atlantic Ins. Co.*, 40 Mo. 33; *Coffing v. Taylor*, 16 Ill. 457; but if an element of fraud enters into the transaction, and is the cause of the misunderstanding, a reformation may be granted. *Wiswall v. Hall*, 3 Paige, 313; *De Peyster v. Hasbrouck*, 1 Kern. 587; *Welles v. Yates*, 44 N. Y. 525; *Rider v. Powell*, 28 N. Y. 310.

(1) As in *Coles v. Brown*, 10 Paige, 526, a piece of land which had been subdivided into several lots, was sold at auction to a purchaser for a certain sum, and the vendor, in a suit for a specific performance, alleged and proved that the land was put up and sold by the lot, and the vendee insisted that he understood the land was put up in one block, and that he bid for it at a price intended to be for the entire tract, and the evidence left the matter doubtful whether the purchaser did so understand the sale or not, the court refused to enforce the contract against him. See *Lyman v. U. S. Ins. Co.*, 17 Johns. 383, per PLATT, J.; *James v. State Bank*, 17 Ala. 69; *Story Eq. Jur.* § 134.

(2) The circumstances may be extrinsic to the contract itself, in addition to doubt as to a common understanding of the parties—such as laches, change in the situation, or relations of the parties, etc. See *Legal v. Miller*, 2 Ves. Sen. 299; *Price v. Dyer*, 17 Ves. 364. In *Garrard v. Grinling*, 2 Sw. 244, the controlling circumstance was a great lapse of time.

(3) *Higginson v. Clowes*, 15 Ves. 516, Sir WM. GRANT laid down the distinction expressed in the text, holding that defendant had a *right* to have his own version

ticular application of it, if the defendant supposed or understood that a certain usual stipulation or covenant was implied from the provisions of the contract, and such an understanding was from the nature of the agreement or the surrounding circumstances a reasonable one, the insertion of such a stipulation will be required as the condition of a specific performance; that is, the court will treat the contract as containing the clause, and enforce it as thus modified.<sup>(1)</sup>

SEC. 253. The fact of his mistake, and the parol modification of the written contract made necessary thereby, are, in most instances, alleged by the defendant in his answer by way of defense; how far he may also, in a proper case, demand and obtain affirmative relief, depends upon the rules of procedure. The mistake and consequent parol variation to be made in the contract may also, however, be set up in the first instance by the plaintiff for the purpose of offering to the defendant his election—of tendering him the option either to rescind the agreement entirely, or to submit to a performance of it in

enforced whenever there has been a mistake in the written agreement, and the defendant's version of the agreement has been adopted by the court; but that when the court does not decide in favor of defendant's version, but simply finds the fact that he had contracted under a mistake, then he could only insist as a right upon a dismissal of the plaintiff's bill. See, however, the report of a subsequent decision of the same facts in another case. *Clowes v. Higginson*, 1 V. & B. 524. Also, as examples of the rule, *Ramsbottom v. Gosdon*, 1 V. & B. 165; *Clarke v. Grant*, 14 Ves. 519. In *Lord Gordon v. Marquis of Hertford*, 2 Mad. 106, which was a suit to enforce an alleged agreement of the several defendants to execute bonds in the amount of 1,500*l*, the defendants showed, by parol evidence, that the agreement ought to have been for a joint bond in that sum made by all, the court gave the plaintiff his election to have his bill dismissed, or to have a decree enforcing the agreement to give a joint bond. In *Clarke v. Moore*, 1 Jon. & Lat. 723, the plaintiff sues to enforce an agreement to take a lease, and defendant proving a parol bargain for a diminution of the rent, which was admitted by the plaintiff, the decree was for a lease at the lower rent. In *London & Birmingham R'y Co. v. Winter*, Cr. & Ph. 57, a performance was decreed in accordance with a parol addition to the written contract proved by the defendant and admitted by the plaintiff.

(1) As, for example, a usual covenant may thus be inserted in a lease the execution of which is ordered. *Ricketts v. Bell*, 1 DeG. & Sm. 335. When a covenant for renewal contained in a lease originally given 150 years before, had been by the plaintiff and his ancestors, during all that time, uniformly acted upon in renewing the lease to the defendant and his predecessors, in a manner quite different from its literal terms, the plaintiff was not suffered to enforce it according to its exact terms, but was required, in a suit brought to compel the acceptance of a new lease, to treat it as though it had actually been altered, so as to read in accordance with the long practice—in other words, performance was coupled with a modification of the contract. But there was really no mistake *here*; only *acquiescence*. *Davis v. Hone*, 2 Sch. & Lef. 341.

the modified or varied form.(1) In the cases falling within the present subdivision, as well as in those which are brought to obtain the remedy of a rescission or of a reformation, the mistake of the defendant, and the modification which it would introduce into the written contract, must be clearly established by cogent evidence. Although, as has already been stated, neither the statute of frauds, nor any principle of judicial proof, renders a written agreement absolutely inviolable, yet a party is not permitted to avoid or escape from such a contract, formally signed and delivered by him, upon any parol evidence of his own mistake, unless such evidence is sufficient to create an undoubted conviction in the judicial mind of the court.(2)

SEC. 254. In the foregoing discussion of the remedies granted to the defendant or to the plaintiff, where the defendant proves a mistake in the contract alleged by the plaintiff, and establishes by means of his own evidence a different but correct version of their agreement, the cases which have been cited and the rules which they established, have arisen and grown out of the principles of equity procedure which have prevailed in the English court of chancery, and in the American tribunals exercising an equitable jurisdiction. It is plain that the remedial rights of the parties and the remedies which shall be awarded to them, must, to a very great extent, depend upon these rules of procedure, and especially upon those which regulate the mode of pleading and the granting of affirmative relief to the defendant upon his own allegations. It is also equally plain that a very great change has been wrought in this respect by the reformed system of procedure, which now prevails in such a large number of the states and territories of the United States. In order to reconcile the cases which treat of the general subject now under discussion, and to harmonize and reduce into a consistent system the apparently conflicting rules which they lay down, it is in the highest degree necessary to ascertain and to keep constantly in mind the very different relations which may exist between the litigant parties in a suit for specific performance, where the defendant proves an error in the contract as alleged by the plaintiff, and establishes by his own evidence another and correct version of the agreement; since the decision made by the court and the doctrine which it announces may or must depend upon the nature of these relations. In the first place, the defendant may

(1) For an example, although the mistake was then the *plaintiff's*, see *Harris v. Pepperell*, L. R. 5 Eq. 1; also *Robinson v. Page*, 3 Russ. 114.

(2) See *Wood v. Scarth*, 2 K. & J. 33.

show the mistake or error in the contract set up by the plaintiff, and may incidentally prove the correct version, purely as a matter of defense, simply for the purpose of defeating the plaintiff's recovery, not asking or being willing to accept a reformation, or the enforcement of the agreement as he has proved it to be, or any other affirmative relief; while the plaintiff combats the defendant's version, and insists upon his own or none. In the second place, the plaintiff, after the defendant has established his own version of the agreement to be the correct one, may be willing to accept it, and may demand a decree compelling its specific enforcement, although it differs materially from that set out in his own pleading, while the defendant opposes the granting of such relief to the plaintiff, is unwilling that any form of the contract should be enforced in the pending suit, and insists that the action should be wholly dismissed. In the third place, after the plaintiff has accepted the version of the agreement proved by the defendant, as under the circumstances last mentioned, the defendant may submit to the relief being granted, and a decree enforcing the defendant's version would then be made without opposition—a decree really by consent. Again, in some special cases, after a written contract has been proved by the plaintiff, and a subsequent parol variation of it is shown by the defendant, the defendant himself is suffered or even required to elect which form of the agreement shall be enforced. Finally, the defendant may allege and prove an error in the contract as set out by the plaintiff, establish his own version to be correct, and demand the affirmative relief that the written instrument upon which the plaintiff has sued, should be reformed, so as to correspond with the actual agreement which he himself has proven, and that the contract thus corrected should be specifically enforced, while the plaintiff, on his part, resists the granting of any such relief to the defendant, and insists that his own version of the contract should be enforced or his suit dismissed. How far a relief shall be granted to the plaintiff based upon facts other than those which he has averred, and how far affirmative relief shall be granted to the defendant, must largely depend upon the rules of procedure. I shall add a brief recapitulation of the doctrines which have been discussed in the foregoing paragraphs of this *Second Subdivision*, which are based upon the general principles of the chancery procedure.

SEC. 255. As has already been shown, upon the defendant's proof of an error or a parol variation in the contract alleged by the plaintiff, the plaintiff is not necessarily dismissed without any relief; he may

often, and perhaps generally, elect whether to take a dismissal of his suit, or decree for a specific performance of the contract in its modified form, as proved by the defendant.(1) A decree reforming the contract in accordance with the defendant's proof, and enforcing it as thus corrected, may also be granted on the defendant's demand.(2) Whether in the former of these cases the plaintiff's suit shall be dismissed, or he shall be suffered to elect, must depend, to a large extent, upon the nature of his allegations, how far they differ from the proofs given by the defendant, and also upon the freedom with which amendments are allowed. The plaintiff cannot allege one contract in his pleading, and have judgment upon an entirely different one as made out either by his own evidence or by that of the defendant.(3) If the plaintiff sets out one contract in his pleading, and the defendant proves that the plaintiff's allegations are untrue in any material element, the *right* to a recovery is certainly defeated, unless an amendment is permitted, and the allowance of amendments is regulated by rules of procedure which have no special application to suits for a specific performance.(4)

SEC. 256. The following propositions may be given as the conclusions derived from the decided cases: 1. When the contract set up in the complaint is denied by the answer, and is not established by the evidence, as it is alleged, this is a complete failure of proof, and the plaintiff's suit will be dismissed. 2. When the defendant admits a contract substantially as averred by the plaintiff, or the same as far as it goes, but sets up a parol modification or addition thereto—whether such defense shall be admitted, and if so, upon what terms or conditions—largely depends upon the circumstances of each case. The plaintiff's suit may be dismissed, or the defendant may have a decree modifying the agreement and enforcing it as thus altered. 3. When the plaintiff fails to make out the contract

(1) *Martin v. Pycroft*, 2 DeG. M. & G. 785; *Bradford v. Union Bank*, 13 How. (U. S.) 57, 69; *Ryno v. Darby*, 5 C. E. Greene, 231; *London, etc., R'y Co. v. Winter*, 1 Cr. & Ph. 57; *Jeffery v. Stephens*, 6 Jur. (N. S.) 947; *Doe v. Doe*, 37 N. H. 268; *Buck v. Dowley*, 16 Gray, 555.

(2) *Stapylton v. Scott*, 13 Ves. 425; *Gwynn v. Lethbridge*, 14 Ves. 585; *Bradford v. Union Bank*, *supra*.

(3) *Allen v. Burke*, 2 Md. Ch. 534; *Sims v. McEwen*, 27 Ala. 184.

(4) *Harris v. Knickerbacker*, 1 Paige, 209; 5 Wend. 638; *Phillips v. Thompson*, 1 Johns. Ch. 131, 146; *Forsyth v. Clark*, 3 Wend. 637; *Bellows v. Stone*, 14 N. H. 175; *Parrish v. Koons*, 1 Parsons Eq. Cas. 79; *Craige v. Craige*, 6 Ired. Eq. 191; *Sims v. McEwen*, 27 Ala. 184; *Hoxie v. Carr*, 1 Sumner, 173; *Lindsay v. Lynch*, 2 Sch. & Lef. 1.

as alleged by himself—and which must, therefore, so far as the case shows, have been incorrectly alleged—the court does not willingly permit him, *against the defendant's objection*, to avail himself of the different agreement—and so far as the case shows the correct one—which the defendant has averred in his answer and established by his evidence.(1) 4. It has been shown that where a plaintiff has knowingly made a misrepresentation affecting some part of the agreement, he cannot waive such portion and enforce the residue. But a wrong statement made by him in good faith, and not interfering with the substantial terms of the contract, will not prevent him, *if the case is otherwise a proper one for granting the relief*, from availing himself of the agreement as alleged and proved by the defendant, and obtaining a decree for its enforcement.(2)

SEC. 257. In respect to the mode of pleading the cause of action, when there has been a parol variation, the plaintiff should, for his own advantage and, perhaps, security, aver the facts as they actually exist, alleging the written agreement, and adding any parol promise, stipulation, terms, or representation, by which it has been varied or modified, and then leave it to the defendant to elect whether he will accept the agreement, as embodied in the writing, or insist upon the parol modification.(3) But if he does not adopt this method of stating the case, he will not, as we have seen, necessarily fail of obtaining any relief. Although he alleges the written contract alone, and the defendant establishes another version differing considerably from that set out in the plaintiff's pleading, the court may decree in the plaintiff's favor by enforcing the agreement proved by the defendant; this form of relief is, however, a matter of pure discretion, and not of right.(4) Finally, the court may, in its discretion, decree in the

(1) *Lindsay v. Lynch*, 2 Sch. & Lef. 1; *Clowes v. Higginson*, 1 V. & B. 524; *Pilling v. Armitage*, 12 Ves. 78.

(2) *Ramsbottom v. Gosdon*, 1 V. & B. 165; *London, etc., R'y Co. v. Winter*, 1 Cr. & Ph. 57; *Martin v. Pycroft*, 2 DeG. M. & G. 788.

(3) *Martin v. Pycroft*, 2 DeG. M. & G. 788; *Ives v. Hazard*, 4 R. I. 14.

(4) *Ramsbottom v. Gosdon*, 1 V. & B. 165; *London, etc., R'y Co. v. Winter*, 1 Cr. & Ph. 57; *Lord Wm. Gordon v. Marquis of Hertford*, 2 Madd. 122; *Garrard v. Grinling*, 2 Sw. 244; *Flood v. Finlay*, 2 Ball & B. 9; *Clark v. Grant*, 14 Ves. 519; *Bradford v. Union Bank*, 13 How. (U. S.) 57; *Wallace v. Brown*, 2 Stockt. Ch. 308; *Ryno v. Darby*, 5 C. E. Green, 231; *McComas v. Easley*, 21 Gratt. 31. In the last two cases the plaintiff was permitted to have a decree for the performance of a contract, as alleged and proved by the defendant, without being required to amend his pleading; but this relief was expressly said to be a matter of discretion depending upon the circumstances of the case. *Doe v. Doe*, 37 N. H. 268; *Buck v. Dowley*, 16 Gray, 555.

defendant's favor a specific performance of the contract, as alleged in his answer and proved by his evidence, without putting him to the delay and trouble of a cross-suit.(1)

SEC. 258. The foregoing doctrines, so far as they relate to the granting of the affirmative relief of reformation and specific enforcement of the contract, as reformed, to the defendant, have been greatly modified by the rules of the reformed procedure, and this modification must be recognized in the states where that system prevails. The reformed procedure, as one of its distinctive features, permits a "counter-claim" to be set up by the defendant, by means of which he becomes a virtual plaintiff, and is *entitled*, as a matter of right, to affirmative relief. The counter-claim is a cause of action in favor of the defendant connected with that alleged by the plaintiff, and may be either legal or equitable. The claim to reform or modify the agreement set up by the plaintiff, and to enforce it, as thus varied, falls within every definition of the counter-claim. In most of the states where the system has been adopted, the counter-claim is set up in the defendant's answer, either alone or in connection with any matter purely defensive; but, in a few of them, the answer must be put into the form of a cross-complaint or petition. The result of this legislation cannot be doubted. If the defendant in a suit for specific performance, alleges by way of counter-claim, a parol variation or modification of the contract as set out by the plaintiff, and demands a reformation and specific enforcement as reformed, and sufficiently establishes his averments by his evidence, the granting to him the affirmative relief is no longer a matter of discretion; it has become a matter of right inhering in the defendant. The doctrines of the cases which have been decided upon the equity practice must, therefore, be modified in this respect wherever the reformed procedure prevails. The freedom of amendment allowed by the new system will, also, probably work some changes in the matter of granting an election to the plaintiff under the circumstances heretofore described.

SEC. 259. *Third: Where mistake is alleged by the plaintiff as a ground for reforming his agreement, and enforcing its specific performance when thus corrected.*—Although, as has been shown in the foregoing subdivisions, parol evidence may be introduced by the defendant, in order to defeat a specific performance of a written contract, by showing that, through mistake or fraud, it does not express the real agreement made by the

(1) *Spurrier v. Fitzgerald*, 6 Ves. 548; *Fife v. Clayton*, 13 Ves. 546; *Gwynn v. Lethbridge*, 14 Ves. 585; *Bradford v. Union Bank*, *supra*.



parties, or by showing that the agreement was induced by fraud, mistake, or misrepresentation, yet, on the other hand, the doctrine is fully settled in England that this cannot be done by the plaintiff. The plaintiff cannot, in this manner, prove a mistake or a fraud, and by means of parol evidence establish the modification in the terms of the contract, which would result from such error or fraud, for the purpose of obtaining, in the same suit, a specific performance of the written agreement so varied,(1) unless there has been a part performance of the parol variation, in which case the written contract, with the modification, will be specifically executed.(2)

SEC. 260. This doctrine is fairly open to the following observations: *First*. When the alleged mistake, and *a fortiori*, when the fraud is committed by the plaintiff, it would be manifestly unjust that he, the actor in the suit brought to enforce the wrongful or imperfect agreement, should be allowed to correct his own error, or obviate the effects of his own deceit, and obtain a specific performance of the contract which had been thus amended. In its application to this case, the doctrine rests upon the surest foundations of equity, and prevails in the United States as well as in England. But, *secondly*. When the error is common, or the fraud is committed by the adverse party, so that the contract is one which may be reformed, there is certainly no greater inherent injustice in permitting such correction to be made on the demand of the plaintiff, and by means of parol evidence introduced on his part, than in allowing it to be made on the allegations, parol proofs, and contention of the defendant. And when we con-

(1) *Woollam v. Hearn*, 7 Ves. 211; 2 *White & Tudor's Lead. Cas.* in *Mq.* 484 (920, 4th Am. ed.); *Rich v. Jackson*, 4 Bro. C. C. 514; 6 Ves. 334, n.; *Higginson v. Clowes*, 15 Ves. 516, 523; *Winch v. Winchester*, 1 V. & B. 375, 378; *Clinan v. Cooke*, 1 Sch. & Lef. 22, 38; *Manser v. Back*, 6 Hare, 447; *Equire v. Campbell*, 1 My. & Cr. 480; *London & Birmingham Ry. Co. v. Winter, Cr. & Ph.* 57, 61; *Emmett v. Dewhurst*, 3 McN. & G. 587; *Atty.-Gen. v. Sitwell*, 1 Y. & C. Ex. 559; *Davies v. Fitton*, 2 Dr. & W. 225, 233. There are early *dicta* suggesting a contrary view of Lord HARDWICKE in *Walker v. Walker*, 2 Atk. 98, 100; 6 Ves. 335, n.; and *Joynes v. Statham*, 3 Atk. 388; of Lord THURLOW, in *Pember v. Mathers*, 1 Bro. C. C. 52; and of Lord ELDON, in *Marquis Townshend v. Stangroom*, 6 Ves. 328, 339; and see, also, *Harrison v. Gardner*, 2 Mad. 198; *Clark v. Grant*, 14 Ves. 524, per Sir Wm. GRANT; *Clifford v. Turrell*, 1 Y. & C. C. 138, per KNIGHT BRUCE, V. C. In *Martin v. Pycroft*, 2 DeG. M. & G. 785, a limitation seems to have been established to the general doctrine as stated in the text, viz.: that plaintiff may prove a parol modification, which, if it had been alleged by the defendant, and submitted to by the plaintiff, would have been made a part of the written agreement, and enforced with it by the court; and see *Robinson v. Page*, 3 Russ. 114.

(2) *Legal v. Miller*, 2 Ves. 299; *Pitcairn v. Ogbourne*, 2 Ves. 375; *Anon.*, 5 Vin. Abr. 522, pl. 38.

sider that the plaintiff is always able, in the cases supposed, to obtain a reformation of the written contract by the use of the same parol evidence in a separate suit instituted for that very purpose, and can, in a second suit, compel a specific performance of the agreement thus corrected, the rule forbidding the attainment of this final result in one proceeding, seems to be an instance of the supreme devotion to mere form which was such a marked characteristic of even the ablest English courts during their entire history until within a very recent period. Whenever the remedy of reformation is simply a preliminary step to that of specific performance, there is no reason, in the nature of things, why they should not both be granted in one judicial proceeding.

SEC. 261. The American courts have pursued, in this respect, the more simple, consistent, and enlightened course of adjudication. The doctrine is well settled in the United States, that where the mistake or fraud in a written contract is such as admits the equitable remedy of reformation, parol evidence may be resorted to by the plaintiff seeking to enforce, as well as by the defendant seeking to defeat a specific performance. The plaintiff may allege and by parol evidence prove the mistake or fraud, and the modification in the written contract made necessary thereby, and may obtain a decree for the specific execution of the agreement thus corrected.(1) The defect in the

(1) Chancellor KENT, in *Keisselbrack v. Livingstone*, 4 Johns. Ch. 148, expressed the following opinion of the doctrine: "Why should not the party aggrieved by a mistake in the agreement have relief as well when he is plaintiff as when he is defendant? It cannot make any difference in the reasonableness and justice of the remedy, whether the mistake were to the prejudice of the one party or the other. If the court be a competent jurisdiction to correct such mistakes—and that is a point understood and settled—the agreement when corrected and made to speak the real sense of the parties ought to be enforced, as well as any other agreement perfect in the first instance. It ought to have the same efficacy and be entitled to the same protection, when made accurate under a decree of the court, as when made accurate by the act of the parties." See Story Eq. Jur. § 166, n. See, also, in support of the American doctrine, the following cases: *Bellows v. Stone*, 14 N. H. 175; *Smith v. Greeley*, 14 N. H. 378; *Craig v. Kirtledge*, 3 Foster, 231; *Tilton v. Tilton*, 9 N. H. 385; *Beardsley v. Knight*, 10 Vt. 185; *Glass v. Hulbert*, 102 Mass. 24, 41; *Metcalf v. Putnam*, 9 Allen, 97; *Coob v. Preston*, 2 Root, 78; *Sandford v. Washburn*, 2 Root, 499; *Elmore v. Austin*, 2 Root, 415; *Chamberlain v. Thompson*, 10 Conn. 243; *Wooden v. Haviland*, 18 Conn. 101; *Lyman v. Unit Ins. Co.*, 17 Johns. 377; *Gooding v. McAllister*, 9 How. Pr. 123; *Hyde v. Tannea*, 1 Barb. 75; *Gouverneur v. Titus*, 1 Edw. Ch. 477; 6 Paige, 347; *Gillespie v. Moon*, 2 Johns. Ch. 585; *Coles v. Brown*, 10 Paige, 535; *Rosevelt v. Fulton*, 2 Cow. 129; *Smith v. Allen*, Saxton, 43; *Hendrickson v. Ivins*, Saxton, 562; *Christ v. Dittenbach*, 1 Serg. & R. 464; *Moliere v. Penn. Ins. Co.*, 5 Rawle, 347; *Gower v. Sterner*, 2 Whart. 75; *Bowman v. Bittenbender*, 4 Watts, 290; *Clark v. Partridge*, 2 Barr. 13, 4 Barr. 166; *Susquehanna Ins. Co. v. Perrine*, 7 W. & S. 348; *Wesley v. Thomas*, 6 Har. & Johns. 24; *Coutt v. Craig*, 2

contract must, however, be proved beyond any reasonable doubt, by evidence of the clearest and most satisfactory nature.(1) The burden of proof is on the plaintiff; and this burden requires him to show, not only that the parties had a different intention from that expressed in the writing, at the commencement of their negotiation or when they first agreed upon the contract, but also that this intention had not been changed at the time of, or before, the actual signing and delivery of the written instrument;—otherwise the inference would necessarily arise that the parties had abandoned this their original intention, and had adopted in place of it the one expressed by the writing.(2) It is not sufficient merely to prove a mistake, which might be the ground for a rescission. In order that the plaintiff may have the remedy of reformation, he must show something to *amend by*; an alteration of the writing cannot be made upon a conjecture as to the true reading, even though the court is satisfied that the existing instrument does not express the real intention of the parties.(3)

Hen. & Munf. 618; *McCall v. Harrison*, 1 Brockenborough, 126; *Newsom v. Bufferlow*, 1 Dev. Eq. 383; *Brady v. Parker*, 4 Ired. Eq. 430; *Rogers v. Atkinson*, 1 Kelly, 12; *Clopton v. Martin*, 11 Ala. 187; *Harris v. Columbiana Ins. Co.*, 18 Ohio, 116; *Webster v. Harris*, 16 Ohio, 490; *Shelby v. Smith*, 2 A. K. Marsh. 504; *Worley v. Tuggle*, 4 Bush, 168, 173; *Shipp v. Swann*, 2 Bibb, 82; *Bailey v. Bailey*, 8 Humph. 230; *Willis v. Henderson*, 4 Scam. 13; *Leitensdorfer v. Delphy*, 15 Mo. 160. In *Murphy v. Rooney*, 45 Cal. 78, the defendant in an action to recover possession of land set up, by way of counter-claim, a written contract for the sale of the land, and sought to have a mistake in it corrected by parol evidence, and then to have it specifically performed as corrected, and this relief was granted him. Such a defendant is, of course, in the position of a plaintiff. *Murray v. Dake*, 46 Cal. 644. In *Whitaker v. Van Schoiack*, 5 Oreg. 113, it was said that a court of equity will not generally compel the specific performance of a written contract with variations or additions introduced by parol evidence, for such a course would be an attempt to enforce a contract partly written and partly verbal, while the court of equity regards the writing as the highest evidence of the parties' intent without reference to the requirements of the statute of frauds. See, however, *Quinn v. Roath*, 37 Conn. 16.

(1) *Nevius v. Dunlap*, 33 N. Y. 676; *Lyman v. U. Ins. Co.*, 2 Johns. Ch. 630; 17 Johns. 373; *Harris v. Reece*, 5 Gil. 212; *Beard v. Linticum*, 1 Md. Ch. 345; *Hunter v. Bilyeu*, 30 Ill. 246; *Selby v. Geines*, 12 Ill. 69; *Bailey v. Bailey*, 8 Humph. 230; *Harrison v. Howard*, 1 Ired. Eq. 407; *Brady v. Parker*, 4 Ired. Eq. 430.

(2) *Stine v. Sherk*, 1 W. & S. 195.

(3) *Lyman v. U. Ins. Co.*, 2 Johns. Ch. 630; *Keisselbrack v. Livingston*, 4 Johns. Ch. 144; *Matthews v. Terwilliger*, 3 Barb. 50; *Rider v. Powell*, 28 N. Y. 310; *Hall v. Clagett*, 2 Md. Ch. 153; *Philpot v. Elliott*, 4 Md. Ch. 273; *Hunt v. Rousmanier*, 1 Pet. 1; *Durant v. Bacot*, 2 McCarter, 411; *Snyder v. May*, 7 Harris, 239; *Tesson v. Atlantic Ins. Co.*, 40 Mo. 33; *Beebe v. Young*, 14 Mich. 136;

SEC. 262. In those states which have adopted the reformed American system of procedure there can be no doubt or question in regard to this doctrine. In one civil action, whether denominated "equitable" or legal, the plaintiff may not only unite and obtain both the equitable remedy of a reformation and the equitable remedy of a specific performance, but also the equitable remedy of reformation and the legal remedy of a pecuniary judgment for debt or damages for the breach of the contract as corrected, or the legal remedy of a recovery of specific lands or chattels.(1) The defendant also becoming the real

*Andrews v. Essex, etc., Ins. Co.*, 3 Mason, 6; *Fowler v. Fowler*, 4 DeG. & J. 265. In this last case the rule was thus stated: "It is clear that a person who seeks to rectify a deed, on the ground of mistake, must be required to establish in the clearest and most satisfactory manner that the alleged intention to which he desires it to be made conformable, continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought." In some cases the requirement that it must be shown affirmatively that the original intent continued down to the time of executing the instrument, has not been insisted upon, as in the passage just quoted. Thus in *Tesson v. The Atlantic Mut. Ins. Co.*, 40 Mo. 33, 36, the rule is thus laid down: "A court of equity has jurisdiction to reform a policy of insurance or other written contract upon parol evidence, where the agreement really made by both parties has not been correctly incorporated into the instrument through accident or mistake in the framing of it; but both the (original) agreement and the mistake must be made out by the clearest evidence according to the understanding of both parties as to what the contract was intended to be, and upon testimony entirely exact and satisfactory, and it must appear that the mistake consisted in not drawing the instrument according to the agreement that was made." In applying the doctrine it has been held that where two parties verbally enter into an agreement, and agree that it shall be put into a written form, and one of them draws up the writing so that it deviates from their original contract, and the other, not knowing of the change, signs the instrument supposing that it expresses their real agreement, the one who was thus misled is entitled to a reformation. And the same remedy is granted where, under like preliminary circumstances, one of the parties knows that the scrivener has altered the contract in the process of reducing it to writing, and permits the other party to sign it in ignorance of the change. *Rider v. Powel*, 28 N. Y. 310; *Matthews v. Terwilliger*, 3 Barb. 50. There was, of course, no *mutual* mistake in these cases, and they properly fall under the head of "misrepresentation" or "concealment," or, perhaps, under that of positive "fraud."

(1) See Pomeroy on Remedies, §§ 78-85. Reforming an instrument and recovering pecuniary judgment on it as reformed. *Bidwell v. Astor Ins. Co.*, 16 N. Y. 263; *Cone v. Niagara Ins. Co.*, 60 N. Y. 619; 3 T. & C. 33; *N. Y. Ice Co. v. N.W. Ins. Co.*, 23 N. Y. 357, 359; *Welles v. Yates*, 44 N. Y. 525; *Caswell v. West*, 3 T. & C. 383. Reformation and other special relief, such as recovery of land, and the like. *Laub v. Buckmiller*, 17 N. Y. 620; *Lattin v. McCarty*, 41 N. Y. 107; *Phillips v. Gorham*, 17 N. Y. 270. See, also, on the general subject, *Gray v. Dougherty*, 25 Cal. 266; *Walker v. Sedgwick*, 8 Cal. 398; *Henderson v. Dickey*, 50 Mo. 161, 165; *Guernsey v. Am. Ins. Co.*, 17 Minn. 104, 108; *Montgomery v. McEwen*, 7

actor, and setting forth an affirmative cause of action, may, by means of his counter-claim, comprise in one decree against the plaintiff the same equitable, or equitable and legal relief.(1)

SEC. 263. Although the general doctrine, as above stated, is accepted throughout the United States, a very important division exists among the judicial decisions with respect to its application to contracts which are required, by the statute of frauds, to be in writing. This division turns upon the nature and effects of the mistake or the fraud, and the kind of relief demanded by the plaintiff. In contracts required by the statute to be in writing, all possible errors, whether resulting from mistake or fraud, may be reduced to the two following classes: 1. By means of the error the contract may apply to or include within its terms lands or other subject-matter, which were not intended to come within its operation; in which case the parol evidence will show that such land should be omitted, and the relief demanded will be a correction which shall exclude it, and shall confine the operation of the contract to the remaining subject-matter. 2. By means of the error the contract may omit or fail to apply to land or other subject-matter which was intended by the parties to come within its operation; and the parol evidence would then show that this land should be included, and the relief will be a modification which shall cause the contract to embrace it, and shall thus extend the operation of the written instrument. It is obvious that in the first of these cases the relief does not conflict with the statute of frauds, because it does not make or enforce a parol contract, but simply restricts a written one already made. In the second case the relief seems to conflict, in a direct manner, with the statute of frauds, since it virtually consists in the enforcement of a parol contract concerning land. The latter remedy is the parol extension of a written contract, so that it shall embrace land not otherwise within its scope; the former is simply the withdrawal of land from the scope of a written contract which is left in full force with respect to its remaining subject-matter; one is an affirmative process of making or at least enlarg-

Minn. 351. But see, as inconsistent with this general doctrine of the reformed procedure, the views of the Wisconsin court in *Noonan v. Orton*, 21 Wisc. 282; *Supervisors v. Decker*, 30 Wisc. 624, 626; *Horn v. Ludington*, 32 Wisc. 73; *Lawa v. Hyde*, 39 Wisc. 345.

(1) See *Pomeroy on Remedies*, §§ 91-97, and cases cited; *Hoppough v. Struble*, 60 N. Y. 430; *Haire v. Baker*, 5 N. Y. 357; *Crary v. Goodman*, 12 N. Y. 266, 268; *Guedici v. Boots*, 42 Cal. 452, 456; *Bartlett v. Judd*, 21 N. Y. 200, 203; *Ingles v. Patterson*, 36 Wisc. 373; *Cavalli v. Allen*, 57 N. Y. 508; *Talbert v. Singleton*, 42 Cal. 390; *Petty v. Malier*, 15 B. Mon. 604; *Onson v. Cown*, 22 Wisc. 329.

ing a written contract ; the other is a negative process of limiting such a contract already made. The division of opinion mentioned above relates to these two classes of errors. According to one theory, parol evidence can only be admitted in the first case where the relief is purely restrictive ; according to the other, it may be admitted and the relief granted in both cases.

SEC. 264. This latter form of the doctrine, in all its breadth, is maintained by a preponderance of judicial authority in this country by courts and jurists of the highest character. It holds that whether the contract is executory or executed, the plaintiff may introduce parol evidence to show a mistake or fraud whereby the written contract fails to express the actual agreement, and to prove the modifications necessary to be made therein, whether such variation consists in limiting the scope of the writing, or in enlarging it so as to embrace land which had been omitted through the mistake or fraud, and that he may then obtain a specific enforcement of the contract thus varied ; and such relief may be granted, although the contract is one which is required by the statute to be in writing. Of course, in actual practice the decree does not always provide for a preliminary reformation of the written instrument, and then for its specific performance, but often directs the performance at once as though the correction had been made. In some cases, however, the rights of the plaintiff can only be protected by an actual reformation.(1) This doctrine is illustrated in the clearest manner by the treatment of executed contracts or conveyances of land. It is settled, by the overwhelming preponderance of American authority, that a deed of land may be thus corrected by enlarging its scope, extending its operation to other subject-matter, supplying portions of land which have been omitted, making the estate conveyed more comprehensive—as, for example, changing a life estate into a fee and the like—and that the deed thus corrected may be enforced against the grantor.(2) If this relief can be con-

(1) *Keisselbrack v. Livingston*, 4 Johns. Ch. 144 ; *Phyfe v. Wardell*, 2 Edw. Ch. 47 ; *Hendrickson v. Ivins*, Saxton, 562 ; *Philpot v. Elliott*, 4 Md. Ch. 273 ; *Gower v. Sterner*, 2 Whart. 75 ; *Workman v. Guthrie*, 5 Casey, 495 ; *Tyson v. Passmore*, 2 Barr, 122 ; *Tilton v. Tilton*, 9 N. H. 385 ; *Coles v. Brown*, 10 Paige, 535 ; *Murphy v. Rooney*, 45 Cal. 73 ; *Story Eq. Jur.*, § 161.

(2) *Craig v. Kittredge*, 3 Fost. 231 ; *Smith v. Greeley*, 14 N. H. 378 ; *Blodgett v. Hobart*, 18 Vt. 414 ; *Wiswall v. Hall*, 3 Paige, 313 ; *De Peyster v. Hasbrouck*, 1 Kern. 582 ; *Gouverneur v. Titus*, 1 Edw. Ch. 480 ; 6 Paige, 347 ; *Chamberlain v. Thompson*, 10 Conn. 243 ; *Tilton v. Tilton*, 9 N. H. 385 ; *Hendrickson v. Ivins*, Saxton, 562 ; *Flagler v. Pleiss*, 3 Rawle, 345 ; *Tyson v. Passmore*, 2 Barr, 122 ; *Moale v. Buchanan*, 11 Gill & Johns. 314 ; *Worley v. Tuggle*, 4 Bush, 182 ; *Provost v. Rebman*, 21 Iowa, 419 ; *Wright v. McCormick*, 22 Iowa, 545 ; *Hunter v.*

ferred in the case of a deed which has actually conveyed the title, then it may certainly be granted in the case of executory contracts which do not disturb the legal title.

SEC. 265. In some of the states, however, the courts have refused to apply the doctrine of a parol variation on behalf of the plaintiff to executory contracts within the statute of frauds, where the modification demanded would consist in an enlargement of the scope of the written instrument, so that it should include a subject-matter not embraced within its terms as it stands, or should increase the estate, or otherwise cause it to operate upon interests in land which are not within the written provisions.<sup>(1)</sup> The reasons upon which this restricted theory of equitable jurisdiction is based are very briefly and simply the following: The statute of frauds peremptorily requires that every contract concerning any interest in land, with a certain exception, shall be in writing; that the limitation or restriction of a

Bilyeu, 30 Ill. 228; *Murray v. Dake*, 46 Cal. 644. As a general proposition, such relief, based upon parol variation of a written contract whether executed or executory, can only be given upon the occasion of mistake, surprise or fraud. See *Blakeslee v. Blakeslee*, 10 Harris, 237; *Lee v. Kirby*, 104 Mass. 420. The rule adopted in several states, which allows parol evidence to show that a deed absolute on its face is really a mortgage, even when there was no fraud or mistake in the transaction, appears to be an exception to this general principle

(1) The case in which this view is the most distinctly and ably presented is *Glass v. Hulbert*, 102 Mass. 24. One of two adjoining lots belonging to the defendant was bought in reliance upon the vendor's false and fraudulent representations that it included a certain sixteen acres, whereas it was the other lot which contained these acres. The case was, therefore, not one of a misunderstanding by the two parties in respect to the subject-matter so that there was no actual assent to the same terms. Calling the lot containing the sixteen acres *a*, and the other lot *b*, the purchaser supposed he was buying and intended to buy lot *a*, while the vendor represented that he was buying lot *a*, and thus the minds of both parties in making their actual parol bargain met upon the same point. But in drawing up the contract it was, through the vendor's fraud, made to include lot *b*, and not lot *a*. On discovering the fraud, the purchaser brought his suit for the purpose of compelling the vendor to convey the lot really intended, lot *a*. This relief would thus require a *virtual* correction, at least, of the contract, and its enforcement as corrected. The court refused to grant the remedy, holding that the vendee must be confined to a rescission and a legal action for damages. The opinion of WELLS, J., is exceedingly elaborate and acute, but would greatly limit the beneficent power of equity to prevent fraud. The same theory of the equity jurisdiction was maintained by WESTON, J., in the case of *Elder v. Elder*, 10 Me. 80, although it does not appear that any fraud was alleged as in the *Massachusetts* case. See, also, as more or less supporting the same theory, *Osborn v. Phelps*, 19 Conn. 63; *Westbrook v. Harbeson*, 2 McCord Eq. 112; and *Best v. Stow*, 2 Sandf. Ch. 298, in which the assistant V. C. quoted and relied upon the English decisions exclusively, without a reference to the numerous cases, even those in New York, which had established the American doctrine.

written agreement so that it shall not include all the subject-matter originally within its scope, does not conflict with this statute;(1) but a reformation and enforcement based upon parol evidence, by which the written contract is made to operate upon a new and distinct subject-matter, estate, or interest, is in direct violation of the legislative mandate, and a gross usurpation of power by the court, since it gives effect to a merely verbal agreement in relation to land which is expressly prohibited by the statute.

SEC. 266. It is not necessary nor, perhaps, appropriate for me to enter into any detailed examination of these two theories of the equitable jurisdiction which stand in such marked opposition to each other. The general doctrine first stated, which extends the remedial power of equity over both classes of contracts, is, in my opinion, in complete harmony with the fundamental principles of equity concerning the relief to be granted in cases of fraud or of mistake. The narrower doctrine has, in fact, no necessary connection with the subject of specific performance. The principles which underlie this theory, and which are so ably advocated by the Massachusetts court, would, if carried out to their legitimate and natural results, work a virtual revolution in equity jurisprudence, and would confine its remedial functions within very narrow limits, overturning doctrines and rules which have been regarded as settled since the earliest periods of the equity jurisdiction. They would greatly abridge the remedy of reformation; they would prevent the court from establishing and enforcing parol contracts which the defendant's actual fraud had prevented from being put into writing; and, in fact, these principles cannot be reconciled with the doctrines upon which the jurisdiction of equity to enforce parol contracts in cases of part performance, is rested. The statute of frauds is no real obstacle in the way of administering equitable remedies so as to promote justice and prevent wrong. Equity does not deny or overrule the statute; but it declares that fraud—and the same is true of mistake—creates obligations and confers remedial rights which are not within the statutory prohibition—in respect of them the statute is uplifted.(2)

(1) The cases hold, in conformity with this view, that the complete waiver or abandonment of a written contract concerning land, by a subsequent parol bargain, does not conflict with the statute.

(2) See the language of Lord WESTBURY in *McCormick v. Grogan*, L. R. 4 H. L. 82, 97.



## SECTION XIII.

*The contract must be free from fraud.*

SECTION 267. It requires no authority to show that fraud, which may avoid every juridical transaction, is a reason for refusing to compel the specific execution of a contract. The essence of fraud is knowledge on the part of the person committing it, from which the law always imputes to him the intent (which, in most instances, actually exists, and is not a mere legal inference) to deceive. The particular forms which fraud assumes, the special acts which it employs as the means of accomplishing its deceptive purpose, are numberless. They may all, however, whether consisting in words or deeds, or omissions, be reduced to two general classes: 1, those which are affirmative, false representations; 2, those which are negative, fraudulent concealments. The former class has been already discussed in the foregoing Section XII, and the present section will be confined to "concealments," and some special modes or kinds of deception which are often resorted to in connection with the contract of sale.(1)

SEC. 268. *Concealments.*—It was shown in the foregoing section that when a representation is not only untrue but is fraudulent—that is, when the party making it has either a knowledge of its falsity or no belief in its truth, so that he is legally charged with an intention to deceive—it will not only prevent a specific performance, but may also be a ground for rescinding, or sometimes reforming, the contract in equity, or for a recovery of damages in an action at law for the deceit, or for defeating an action at law brought directly upon the agreement. This fraudulent element, however, is not essential in order to constitute a defense to a suit in equity for a specific enforcement. If the representation is untrue in fact, and thus misleads the other party to his injury, although the party making it may be ignorant of its falsity, and may be innocent of any intention to deceive, the agreement based upon it is thereby rendered unfair and inequitable, and

(1) A specific performance must be denied when the contract was procured by means of duress or threats, and the court will require a less strong case than would be necessary to constitute a ground for rescission. *Miller v. Miller*, 68 Pa. St. 486; *Christian v. Ransome*, 46 Geo. 138; and a specific performance will be refused when the agreement was obtained by undue influence, as when a son obtained from his old and infirm father, an agreement to convey his farm. *Brady's Appeal*, 66 Pa. St. 277. And the same of a contract in the obtaining of which the plaintiff was guilty of bad faith. *McClellan v. Darrah*, 50 Ill. 249.

its specific execution will be refused. The same is true of "concealments." They also may be fraudulent, intentional suppressions of known facts which the party was in duty bound to disclose; or mere omissions to certain facts without any intention of deceiving or misleading. Concealments of the former kind are not only a ground for withholding the remedy of specific performance, but also for a rescission in equity, for an action of deceit, and for a defense to an action at law on the agreement; those of the latter kind can only avail to defeat a specific performance by rendering the contract unfair, unequal, or otherwise inequitable. It is very important, in comparing and estimating the force of the decided cases, to form and preserve a clear and exact notion of this distinction.

SEC. 269. A fraudulent concealment, therefore, is where one party in the preliminary negotiation, or at the time of entering into an agreement, knowingly and intentionally conceals, or, in other words, suppresses a material fact, which, under the relations existing between them, it was his duty to disclose to the other party, and the contract thus made cannot be enforced against the party who has been misled, and will be rescinded at his suit. The principal difficulty, in the application of this doctrine, is the determining when a duty, in the juridical sense of that term, rests upon the person who has knowledge of a material fact, to communicate the same to the other person with whom he is dealing.(1) If there is a relation of trust or confidence

(1) Suppression of truth is ground for refusing a specific performance. *Young v. Clark*, Prec. Ch. 538; *Maddeford v. Austwick*, 1 Sim. 89; *Bonnett v. Sadler*, 14 Ves. 526; *Drysdale v. Mace*, 2 Sm. & Gif. 225; 5 DeG. M. & G. 103; *Shirley v. Stratton*, 1 Bro. C. C. 440; *Baskomb v. Beckwith*, L. R. 8 Eq. 100, per Lord ROMILLY, M. R. "It is of the greatest importance that it should be understood that the most perfect truth and the fullest disclosures should take place, in all cases where the specific performance of a contract is required, and that, if this fails, even without any intentional suppression, the court will grant relief to the man who has been thereby deceived, provided he has acted openly and reasonably." See, also, *Lucas v. James*, 7 Hare, 410; *Denny v. Hancock*, L. R. 6 Ch. 1. But the mere suppression of acts as having been done by the plaintiff, when the defendant must have known that they were done by somebody, is not a ground for refusing a specific performance. *Haywood v. Cope*, 25 Beav. 140. Plaintiff had worked the coal under his land, and had abandoned it as unprofitable. Twenty years afterwards defendant cleaned out the pit and examined the coal in the shaft with other persons, and subsequently contracted for a lease. The mine turned out to be worthless. Held, by Sir J. ROMILLY, M. R., that defendant could not resist a specific performance on the ground that plaintiff had not communicated the fact that he had worked the mine and found it unprofitable, because defendant must have known that it had been worked and abandoned by some one. Cases of actions at law for deceit, and of defenses on the ground of fraud to legal actions brought upon contracts, may be properly cited in illustration of

between the parties, if the person knowing the fact occupies a fiduciary position towards the other, then the duty to disclose is clear. It is not necessary that such fiduciary relation should be express; in many decided cases it has been held to exist from very general circumstances.(1)

SEC. 270. Whatever may be the duty of the vendor to disclose every fact which renders the property less valuable, there is no such duty resting upon an intended purchaser to communicate every or any fact within his knowledge, which renders the property more valuable, and which would therefore tend to enhance the price. Whatever may be the dictates of a strict morality, the law, as a practical rule of common life, assumes that the owner of property will sufficiently protect his own interests by obtaining himself all the information concerning it.(2) This rule must be understood as apply-

the text, since one principle controls both them and the equitable suit for a rescission. In *Edwards v. McLeay*, Coop. 308; 2 Sw. 287, land was sold, a part of which consisted of an encroachment upon a common, and the rights of the lord of the manor, in relation to such encroachment, had not yet been barred by lapse of time; these facts were known to the vendor and not disclosed by him to the vendee, and on account of such concealment the sale, and the conveyance in pursuance thereof, were rescinded. In the leading case of *Gibson v. D'Este*, 2 Y. & C. C. C. 542, land was sold over which was a right of way, which fact was known to the vendor or his agent, and concealed by one or the other of them from the purchaser. On this account V. C. KNIGHT-BRUCE set aside the contract and the deed of conveyance. His decision was reversed by the House of Lords, not, however, because of any error in the principle upon which he had proceeded, but because he had erred in the application of it. The House of Lords held that, in order to rescind a completed sale and conveyance under such circumstances, there must be evidence showing clearly and directly the personal knowledge of the principal, and a concealment by him;—that such knowledge and concealment of the agent were not sufficient;—and that the evidence failed to prove the necessary state of facts. See *Wikle v. Gibson*, 1 H. L. Cas. 605.

(1) See *White v. Flora*, 2 Overtón, 426; *McNeil v. Baird*, 6 Munf. 316; *Pollard v. Rogers*, 4 Call. 439; *Halls v. Thompson*, 1 Sm. & Mar. 443; *White v. Cox*, 3 Hayw. 213; all of which hold that concealment of material facts will avoid a contract in equity. In *Snelson v. Franklin*, 6 Munf. 210, the owner of a lease contracted to sell it without showing it to the vendee or telling him of a certain clause in it which stipulated, that in case the building leased should be burned, the lease should thereupon be ended. The purchaser made the agreement in ignorance of this provision. Soon after the building was burned, and it was held, at the suit of the purchaser, that the agreement should be rescinded, and his notes given for the purchase-price should be surrendered by the vendor and canceled. *Rawdon v. Blatchford*, 1 Sandf. 344; *Brown v. Montgomery*, 20 N. Y. 287; *Holmes' Appeal*, 77 Pa. St. 50.

(2) *Fox v. Mackreth*, 2 Bro. C. C. 400, 420, an intended purchaser of land on which he knows there is a mine need not inform the owner, who is ignorant of

ing only to a claim for rescission, since a concealment by the purchaser certainly may be good reason for denying a specific enforcement for his benefit.<sup>(1)</sup> All that is allowed to the purchaser, however, in such a transaction, even to prevent a rescission of the contract, is mere silence on his part. If, to the suppression of material facts within his knowledge, there is added any affirmative misrepresentation, even the slightest positive deviation from the truth tending to blind the eyes of the vendor, to draw away his attention from the actual condition of affairs, and thus to mislead him into making a sale at all to his disadvantage—even though there might be but a misguiding word—the contract procured in this artful manner could

the fact, and the contract of purchase would be valid. In *Dolman v. Nokes*, 22 Beav. 402, a first mortgagee having made arrangements for an advantageous sale of the land, bought the interest of the second mortgagee at a discount, without informing him of the said prospects for a sale. A suit by the second mortgagee to set aside the contract between himself and the first mortgagee, on the ground of the latter's concealment, was dismissed. In *Livingston v. Peru Iron Co.*, 2 Paige, 390, the purchaser applied to the owner of wild land, representing that it was worth nothing except for sheep pasture, and suppressing a fact which he well knew and the vendor did not, that there was a valuable mine on the land. Ch. WALWORTH refused to set aside the sale procured in this manner. He said: "Although it had been held that the suppression of a material fact by either party to the contract, was sufficient to avoid the contract, that the courts of New York had never gone to that length; although *very* slight circumstances in addition to the intentional concealment of a fact have been considered sufficient to constitute a fraud upon the other party." One would suppose that the vendee's positive misrepresentation in this case was enough to satisfy the requirements of the chancellor's own rule. The decision seems to be opposed to all sound equitable principles. See, also, *Drake v. Collins*, 5 How. (Miss.) 253. *Per contra*—see *Bowman v. Bates*, 2 Bibb, 47—a person discovered a valuable salt spring on another's land, and bought the tract from him at an ordinary price, without disclosing his discovery. The sale was, for that reason, set aside. In law the cases seem to have settled the rule that a purchaser is not liable to an action for deceit for misrepresenting to the vendor the latter's chance to sell, or the probability of his getting a better price than the one offered by the purchaser himself. This is put upon the ground that such representations are essentially mere statements of opinion rather than of fact. For the same reason, it would seem that such statements should not be a defense to an action at law brought upon the contract. See *Vernon v. Keys*, 12 East, 632, per Lord ELLENBOROUGH.

(1) In *Phillips v. Homfray*, L. R. 6 Ch. 770, the owner of a colliery had contracted to purchase an adjoining coal mine from the proprietor thereof. The vendee concealed the fact that he had already got out a considerable quantity of coal from the vendor's mine, without the latter's knowledge. This concealment was held a sufficient ground to prevent a specific performance at the suit of the vendee, although it was not shown that the purchase had been made at any under-valuation—i. e., the purchaser had agreed to pay the price on the supposition that all the coal was still *in situ*. *Swimm v. Bush*, 23 Mich. 99.

not pass the scrutiny of a court of equity; but would be avoided at the suit of the vendor.(1)

SEC. 271. Thus far I have spoken only of concealments which, from their elements of knowledge and intention, are fraudulent, and which may avoid the contract affected by them, and which *a fortiori* furnish the most complete and satisfactory ground for refusing the remedy of specific performance. In addition to these, the suppression of a material fact, or the failure to communicate a material fact by one party, without any intent or purpose of deceiving or misleading the other, while not vitiating the agreement, may render it so unfair, unequal, or hard that a court of equity, acting in accordance with its well-settled principles as developed in the preceding sections of this chapter, will refuse to enforce the contract against the party who was misled. In such a case the two contracting parties do not stand upon an equality; one has knowledge of important facts in respect of which the other is ignorant. That such an inequitable position may prevent a specific performance has already been stated.(2)

SEC. 272. *Other special forms of fraud—Puffers.*—Where property is put up for sale at public auction, the secret employment of a person or persons by the vendors to bid and thus to run up the price, the bystanders not knowing that these bids are merely formal and collusive, is technically called “puffing,” and the persons employed “puffers.” With respect to the legality of the practice and the validity of sales made when puffing has been resorted to, there has been much conflict of judicial opinion, and the dispute has settled into a direct antagonism between the courts of law and those of equity, the former tribunals, strangely enough, taking the strictest view and condemning the practice *in toto*, while the latter admit it to a very limited extent.

(1) Lord ELDON said, in reference to such misstatements added to concealment: “A very little is sufficient to affect the application of that principle. If a word—if a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate.” *Turner v. Harvey*, Jac. 169, 173; *Davies v. Cooper*, 5 My. & Cr. 270. In *Davis v. Abraham*, 5 W. R. (1856-7) 465, an attorney bought of a person who was embarrassed, and who was selling without any professional advice, and untrue stated to the vendor that the nature and title of the land was such that no one but a professional man would be willing to buy it—and on account of this misstatement the court refused to enforce the sale against the vendor

(2) Many of the cases cited in the two preceding sections, as examples of undesigned misrepresentations or of mistakes, may also be referred to as illustrations of the class of concealments mentioned in the text. *Shirley v. Stratton*, 1 Bro. C. C. 440; *Dean v. Rastron*, 1 Anst. 64; *Ellard v. Lord Llandaff*, 1 Ball & B. 241; *Hesse v. Briant*, 6 DeG. M. & G. 623.

Of course, the case is very different and free from all difficulty where a right to make such bidding is openly reserved by the vendor as one of the conditions of the sale. The whole subject has been recently regulated by statute in England, and similar statutes are found in some of the American states. In the absence of special legislation, three different conditions of circumstances may exist, giving rise to those separate rules.

SEC. 273. 1. *Ordinary sale, with no preliminary announcement.*—Where an auction sale is made, in the absence of any preliminary announcement that “the sale will be without reserve,” nor any equivalent statement, the rule is settled *at law*, in England and generally in this country, that any “puffing” is fraudulent, and renders the sale voidable at the option of the purchaser.(1) But the rule is also settled in the courts of equity, that *one* puffer may then be employed on behalf of the vendor, and although his agency is unknown to the bystanders and to the actual purchasers, the contract of sale is nevertheless valid and binding. In other words, “puffing,” to this limited extent—of *one* person to make bids—is not fraudulent.(2)

SEC. 274. 2. If at a sale, such as described in the last paragraph, where no announcement is made that the sale is without reserve, two or more puffers are employed for the vendor, and take a part in the bidding, the sale is thereby rendered fraudulent in equity, as well as at law, it will be set aside at the suit of the purchaser, and a performance of the contract cannot be enforced against his objection. Equity had reluctantly admitted the use of one puffer to protect the interests of the vendor, and prevent a ruinous sacrifice; as one must always be enough for this purpose, the effect of two or more bidding against each other would necessarily be to enhance the price by means of a pretended and deceiving competition.(3)

(1) *Thornett v. Haines*, 15 M. & W. 372, per PARKE, B.; *Crowder v. Austin*, 3 Bing. 368; *Wheeler v. Collier*, 1 Mood. & Walk. 123; *Fuller v. Abrahams*, 3 Brod. & Bing. 116; 6 Moore, 316. This rule is approved by CH. KENT, in Comm. 2 Vol., pp. 538, 539 (5th ed.), and by STORY, in Eq. Jur. § 233.

(2) *Bramley v. Alt*, 3 Ves. 620; *Smith v. Clarke*, 12 Ves. 477; *Woodward v. Miller*, 2 Coll. C. C. 279; *Flint v. Woodin*, 9 Hare, 618. In *Woods v. Hall*, 1 Dev. Eq. 415, a puffer was employed where no announcement seems to have been made, but the vendor represented that the bidding by such puffer was made on his own (the puffer's) account; and the sale was held fraudulent and set aside. Here the express false representation supplied the positive element of fraud, and distinguishes the case from those described by the text.

(3) *Bramley v. Alt*, 3 Ves. 620; *Thornett v. Haines*, 15 M. & W. 372, per PARKE, B.; *Conolly v. Parsons*, 3 Ves. 625; *Meadows v. Tanner*, 5 Madd. 34; *Robinson v. Wall*, 10 Beav. 61; 2 Ph. 372. In *Mortimer v. Bell*, L. R. 1 Ch. 10, a sale at

SEC. 275. 3. *Sale without reserve*.—Finally, where a preliminary announcement is made, or it is stated as one of the conditions, that “the sale will be without reserve,” or words having substantially the same import, this is construed, both in equity and at law, as a pledge on the part of the vendor, that the competition shall be absolutely free, that no means shall be used to enhance the price, and that the property will be knocked off to the highest bidder, whatever be the amount of the bid, whether large or small. The employment of even one puffer, and *a fortiori* of more than one, is a fraudulent act, and renders the sale voidable in equity, as well as at law, and is, of course, a ground for refusing a specific performance.(1)

SEC. 276. 4. *Legislation on this subject*.—The English statute recites the fact, that different rules have prevailed in equity and in law, and declares it to be expedient that the same rule should regulate both jurisdictions. It thereupon enacts that the employment of puffer or puffers shall be unlawful in every case, unless the right to employ such a means of enhancing the price shall be expressly reserved.(2)

SEC. 277. As a secret arrangement between the vendor and his

auction, one of the conditions being that “the highest bidder shall be purchaser,” no announcement that the sale would be without reserve, nor that any one would bid for the vendor. An agent of the vendor bid 2,500*l.*; the auctioneer then bid 2,600*l.*, and the agent and the auctioneer continued bidding against each other until the price reached 3,600*l.*—defendant then bid 3,650*l.*, and the property was struck off to him. Here were, therefore, *two* puffers for the vendor. *Held*, that the vendor could not enforce the contract. The court disapproved, and even questioned the rule allowing *one* puffer.

(1) *Robinson v. Wall*, 2 Phil. 375, per Lord COTTENHAM; *Thornett v. Haines*, 15 M. & W. 367, and cases therein cited; *Meadows v. Tanner*, 5 Mad. 34. In *Robinson v. Wall*, *supra*, and 10 Beav. 61, the assignees of an insolvent offered his life interest in certain land for sale at auction “without reserve;” they had previously made a secret arrangement with a person interested in the remainder, that he should bid 35,000*l.*, and the property would be struck off to him unless higher price was offered. The defendant, ignorant of the arrangement, bought the property, bidding 50,000*l.* for it. The sale to him was held to be vitiated by the vendors’ fraudulent practice. *Gilliat v. Gilliat*, L. R. 9 Eq. 60, arose under the late statute, 30 & 31 Vict., ch. 48, but still illustrates the rule stated in the text. Land was sold at auction, one condition being that the sale was “subject to a reserve bidding,” which was 29 000*l.*; no other reservation or statement was made on the subject. A puffer was employed who ran the property up by several bids to nearly 29,000*l.*, when the purchaser bid that sum, and the land was struck off to him. *Held*, an illegal sale under the statute; that the statute “makes a distinction between *reserved bidding* and a *reserved right to bid*.” Also that, under the statute, any sale is illegal when a puffer has been employed, unless *the right to employ him was expressly reserved*, and a “*reserved bidding*” is not reserved right to employ a puffer.

(2) 30 and 31 Vict., ch. 48.

agents for the purpose of enhancing the price may be a fraud on the purchaser, so, on the other hand, secret agreements between persons desiring to purchase property for less than its value at a public sale, that they will not bid against each other, and that the purchase made by one of the parties at a low price, consequent upon such arrangement, shall enure to the benefit of the other parties, are fraudulent as against the vendor, and a sale made under the operation thereof will be rescinded at his suit.(1) An agreement or understanding among bidders, whose interests are antagonistic, for the purpose of preventing competition and thereby procuring the property to be sold at less than its fair value, is clearly a fraud upon the vendor.(2)

SEC. 278. *Fraud by agents.*—Since a corporation must act through agents, and since it is regarded as a legal entity incapable of fraud as it is incapable of intention, the fraud of those classes of agents which must be considered as its immediate representatives, in whom its corporate powers are primarily lodged, is necessarily imputed to the corporation itself, and produces the same effects as though committed by it. Contracts, therefore, to which a corporation is a party, and from which it would derive a benefit or obtain a right against the other party, are affected by the frauds, whether false representations or concealments, of its agents by whom they were negotiated and concluded, in the same manner and to the same extent as though such agents had entered into the agreements on their own behalf as the principals; the agent's fraud either vitiates the contract, rendering it liable to be rescinded, or constitutes a ground for refusing to enforce it at the suit of the corporation.(3) How far the fraud of an agent generally renders the principal liable, and exposes such principal either to an action at law for deceit, or to a suit in equity for a rescission, or furnishes a defense to a suit at law brought upon the contract by the principal, are questions which have given rise to much discussion and

(1) *Jones v. Caswell*, 3 Johns. Cas. 29; *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. Howe*, 8 Johns. 444; *Thompson v. Davies*, 13 Johns. 112; *Dudley v. Little*, 2 Ham. 505; *Piatt v. Oliver*, 1 McLean, 295; *Gulick v. Ward*, 5 Halsted, 87. Such arrangements may, however, be made with a worthy and legal, and not a fraudulent, intent; and if done in good faith, and to promote the interests of all the parties, they are not open to objection, and do not invalidate the sale. *Wolfe v. Luyster*, 1 Hall, 146; *Smith v. Greenlee*, 2 Dev. 126; *Smull v. Jones*, 1 Watts & Serg. 128; *Phippen v. Stickney*, 3 Metc. 384, and cases cited.

(2) *Smith v. Greenlee*, 2 Dev. 126; *Morehead v. Hunt*, 1 Dev. Eq. 35; *Moncrief v. Goldsborough*, 4 Har. & McHen. 281; *Troughton v. Johnston*, 2 Hayw. 328.

(3) *Ranger v. Great Western Ry. Co.* 5 H. L. Cas. 72; *National Exchange Co. v. Drew*, 2 McQueen, 103; *Angell & Ames on Corp.* §§ 310, 311.



great conflict of opinion ;(1) but it does not come within the province of this work to attempt their answer. There can be no doubt, however, that in accordance with the general principles upon which equity administers this, its peculiar remedy, such fraud is a sufficient ground for refusing to decree a specific performance.

SEC. 279. *Waiver*.—Since fraud, whether consisting of false representations or of intentional concealments, or of any other deceptive practices, does not render a contract absolutely void, but merely *voidable* at the option of the injured party, such party may always waive the objection which might otherwise be taken in his behalf, and thereby ratify the agreement and make it as binding as though it had been originally free from all vitiating incidents or elements. The waiver may be express, or it may consist in acts whereby the party shows an intention to adopt the contract, or whereby he claims and enjoys in whole or in part the benefits which it confers. Such acts, however, in order to constitute a waiver must be done with a full knowledge of all the facts ; for a person cannot be held to have waived, by his conduct, a fraud of which he was at the time wholly ignorant.(2) The doctrine of waiver applies in the same manner and extent to the case of mistake.

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## SECTION XV.

### *The contract must be free from illegality.*

SECTION 280. An illegal contract is, as a rule, void—not merely voidable—and can be the basis of no judicial proceeding. No action can be maintained upon it, either at law or in equity. This impossibility of enforcement exists, whether the agreement is illegal in its inception, or whether, being valid when made, the illegality has been created by

(1) See *Cornfoot v. Fowke*, 6 M. & W. 358 ; *Fuller v. Wilson*, 3 Q. B. 58, 68 ; *National Exch. Co. v. Drew*, 2 McQueen, 103 ; *Wilde v. Gibson*, 1 H. L. Cas. 605, 615 ; *Atwood v. Small*, 6 Cl. & Fin. 413, per Lord LYNDBURST ; *Hern v. Nichols*, 1 Salk. 289.

(2) See *Atwood v. Small*, 6 Cl. & Fin. 432, per Lord LYNDBURST. In *Macbryde v. Weeks*, 22 Beav. 533, the defendant, with complete knowledge of all the facts, notified the plaintiff that the contract would be rescinded unless the plaintiff should perform on his part by a certain day specified, but in this notice he (the defendant) offered to perform his own part of the contract—he was held by this notice and the offer made in it, to have waived an objection which might have been raised on account of any false representations made by the plaintiff. *Allen v. Cerro Gordo Co.*, 40 Iowa, 349.

a subsequent statute.(1) The illegality here spoken of, although analogous to some kinds of constructive fraud, is, of course, to be carefully distinguished from fraud. Agreements are often loosely spoken of as illegal, when they are merely fraudulent, or even when the parties simply lacked the capacity to enter into a binding engagement. Illegality is an element which wholly vitiates the contract between the immediate parties, as well as in respect to third persons, and still it is an element with which society and the state, as represented by the courts, are more immediately concerned than even the parties themselves. If a contract is tainted with the vice of illegality, it is held to create no obligation, not from any concern for the individual rights of the parties who may be equally in fault, but from a regard for the public. In the case of fraud, or mistake, the wrong is personal, and may be waived by the injured party; in the case of illegality the wrong is done to society, and the state, through its judicial officers, must control the penalty. The illegality may inhere either in the consideration or in the very promises and stipulations of the agreement. Again, if the illegality is confined to the consideration, that consideration may consist of two distinct and separable parts, one of which is legal, while the other is alone tainted with the defect. Or, finally, if the illegality is found only in the promises and stipulations, these may consist of separate and divisible terms, some of which are valid and the others invalid. Various special rules are based upon these distinctions, but their discussion belongs rather to a treatise upon the general law of contracts.

(1) *Atkinson v. Ritchie*, 10 East, 530, 534; *Barker v. Hodgson*, 3 M. & S. 267; *Esposito v. Bowden*, 4 El. & Bl. 963. In the case where a contract, originally valid, has become illegal from subsequent legislation, the courts strive to enforce it if possible, or as far as possible. *Betterworth v. Dean of St. Paul*, Sel. Cas. in Ch. 66; *Thomson v. Thomson*, 7 Ves. 473; *Pratt v. Adams*, 7 Paige, 615. A court of equity will not specifically enforce a contract which grows directly out of another which is illegal, immoral, or champertous. *Bowman v. Cunningham*, 78 Ill. 48. Nor a contract founded on an illegal consideration. *Paton v. Stewart*, 78 Ill. 431. The following recent cases furnish examples of contracts illegal, because opposed to the general principles of public policy: Contract by a director with the railroad company for the purchase of company property. *Flanagan v. Great Western R'y Co.*, L. R. 7 Eq. 116. Contracts of purchase at auction, made under secret arrangements, by which competition was prevented. *Whitaker v. Bond*, 63 N. C. 290. A contract of sale made to enable a party to leave the state and thus escape from justice. *Dodson v. Swan*, 2 W. Va. 511. A contract against the policy of the law concerning land. *Smith v. Johnson*, 37 Ala. 633. Sometimes where the parties are not *in pari delicto* the defendant is not permitted to set up the illegality as a defense. *Pingree v. Coffin*, 12 Gray, 288; *Freelove v. Cole*, 41 Barb. 318; *Sandfoss v. Jones*, 35 Cal. 481.

SEC. 281. Every case of illegality must, of course, be determined by positive law, for the very term itself implies not merely the absence, but the actual violation of a legal rule. In certain instances the illegality is created by statute; in all other instances, by the common law independently of statute. For purposes of classification merely, and by way of assigning a reason or motive for the legal rule, certain kinds of contracts are pronounced illegal by the common law because they conflict with public policy; certain other kinds, because they are contrary to good morals. It is not possible, however, to draw the dividing lines with any clearness between these classes. Agreements which are contrary to good morals are also opposed to public policy; and in many instances, contracts which were illegal at the common law, have also been embraced within the prohibitions of special statutes. Without attempting any exhaustive description, I shall state some of the most important and common species of illegal contracts, following in a general manner the classification already mentioned—namely: 1, those prohibited by statute; 2, those which conflict with public policy; 3, those which are contrary to good morals.

SEC. 282. 1. Among the contracts made illegal by statute are those infected with usury; (1) gaming contracts; (2) wager contracts; (3) contracts which are champertous, or tend to promote champerty and maintenance; (4) contracts which are given in consideration of compounding with felonies, or suppressing public prosecutions of criminals. (5) Several of these species are, to a certain extent, illegal by common-law doctrines, but statutes have either extended or defined the illegality. Agreements which hinder, delay and defraud creditors, are not included in this list, because they are not *illegal* and void, but merely *voidable* as against the defrauded creditors, while perfectly valid between the parties themselves.

(1) Story Eq. Jur. § 301; *Fanning v. Dunham*, 5 Johns. Ch. 122.

(2) These were also illegal at the common law. *Robinson v. Bland*, 2 Burr. 1077; *Rawden v. Shadwell*, Ambler's, 263; *Woodroffe v. Farnham*, 2 Vern. 291; *Skipwith v. Strother*, 3 Rand. 214; *Woodson v. Barrett*, 2 Hen. & Mun. 80; *Daile v. Madison*, 5 Leigh, 401.

(3) Some wager contracts were illegal at the common law, when they were opposed to public policy—*e. g.*, a bet on the life of a certain person; but in general they are not illegal. *DeCostar v. Jones*, Coop. 729; *Gilbert v. Sykes*, 16 East, 150.

(4) *Powler v. Knowler*, 2 Atk. 224; *DeHoghton v. Money*, L. R. 2 Ch. 164; 1 Eq. 154. In many of the American states statutes have reduced the number of champertous contracts within very narrow limits.

(5) *Johnson v. Ogilby*, 3 P. Wms. 276—such agreements are undoubtedly illegal at the common law, but they have been condemned also by statute. See *Nickelson v. Wilson*, 60 N. Y. 362.

SEC. 283. 2. Among those illegal by common-law doctrines, because opposed to public policy, are: Marriage brokerage contracts, by which one agrees to negotiate a marriage for the other, for some consideration; (1) contracts in restraint of marriage, (2) although conditions in partial and reasonable restraint of marriage annexed to bequests, gifts, and the like, are sometimes upheld; (3) contracts in general restraint of trade; (4) agreements among persons interested to prevent competition and restrain bidding at public auctions, and especially combinations of such a kind among persons offering proposals for public work, when such work is to be awarded by public officers to the lowest bidder—agreements among persons to prevent competition, and keep up the price, are clearly against public policy and illegal. (5) There is a large class of agreements which tend to interfere with the free and orderly conduct of governmental and public affairs in every department, whether legislative, executive or judicial, which are in the highest degree contrary to public policy—of which the following are examples: Contracts between third persons, or between third persons and members of the legislature, the object of which is to promote or hinder legislation, whether public or private; (6) contracts for the buying, selling or procuring public offices, or for promoting in any manner the appointment of a party to such an office; (7) contracts tending to effect or influence public elections to office; (8)

(1) These sort of contracts appear to have at one time been quite common. *Drury v. Hook*, 1 Vern. 412; *Key v. Bradshaw*, 2 Vern. 102; *Duke of Hamilton v. Mohun*, 2 Vern. 652; *Keat v. Allen*, 2 Vern. 588; *Tooe v. Atkins*, 1 Vern. 451; *Gale v. Lindo*, 1 Vern. 475; *Baker v. White*, 2 Vern. 215; *Kemp v. Coleman*, 1 Salk. 156; *Boynton v. Hubbard*, 7 Mass. 112; *Cole v. Gibson*, 1 Ves. 503; *Smith v. Bruning*, 2 Vern. 392; *Williamson v. Gihon*, 2 Sch. & Lef. 355.

(2) *Woodhouse v. Shepley*, 2 Atk. 535; *Key v. Bradshaw*, 2 Vern. 102; *Baker v. White*, 2 Vern. 215; *Lowe v. Peers*, 4 Burr. 2225; *Hartley v. Rice*, 10 East, 22; *England v. Downs*, 2 Beav. 522; *Conrad v. Williams*, 6 Hill, 445.

(3) *Story Eq. Jur.* §§ 280, 285; *Stackpole v. Beaumont*, 3 Ves. 96; *Scott v. Tyler*, 2 Dick. 719.

(4) *Mitchell v. Reynolds*, 1 P. Wms. 181; *Pierce v. Fuller*, 8 Mass. 223; but in partial restraint, if reasonable in extent, are valid. *Webb v. Noah*, 1 Edw. Ch. 604.

(5) *Jones v. Caswell*, 3 Johns. Cas. 29; *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. Howe*, 8 Johns. 444; *Piatt v. Oliver*, 2 McLean, 267.

(6) *Story Eq. Jur.* § 293, and cases cited in n. 3. A contract for the employment of an attorney to argue in an open and public manner before the whole legislature and before a committee thereof, is valid; but a contract to employ an agent to work with the members privately by means of his own personal influence, or in any other manner, is illegal. See *Nickelson v. Wilson*, 60 N. Y. 362.

(7) *Chesterfield v. Janssen*, 2 Ves. 124; *Hartwell v. Hartwell*, 4 Ves. 811; *Boynton v. Hubbard*, 7 Mass. 119; *Becker v. Ten Eyck*, 6 Paige, 68.

(8) *Walker v. Duke of Portland*, 3 Ves. 444; *Stevens v. Bagwell*, 15 Ves. 139.

agreements to remunerate public officers for acts done contrary to their official duty, or to remunerate them in addition to their lawful fees or salaries for acts which they are bound to do by virtue of their office; (1) assignments of the fees and profits of official positions requiring personal attention and supervision; (2) agreements in consideration of the suppression of criminal prosecutions or the compounding of felonies. (3)

SEC. 234. 3. Among the contracts which are illegal at the common law, because opposed to good morals, *contra bonos mores*, the most important are those in which either the consideration is some future flagrantly immoral act, or the promise is to do such an act; as, for example, illicit sexual intercourse; (4) contracts where the consideration, either past or future, or the promise of the thing to be done, is the commission of some crime, or the express violation of some general law, or the omission of some public duty. (5) Certain species of agreements, already mentioned, might be placed in this class, since they are as much opposed to good morals as to public policy, namely, gaming and wager contracts, and those involving the compounding of felonies or the suppression of prosecutions.

SEC. 285. There are other species of agreements which, though not strictly illegal and void, are *quasi* illegal and voidable, which a court of equity either refuses to enforce altogether, or else enforces only under special circumstances of their good faith, fairness and equity being established in the most conclusive manner. The objection to them is not that they are tainted with fraud, still less that they are founded upon mistake—although they are sometimes loosely spoken of as fraudulent;—it is rather that, judging from the common experience of mankind, they are opposed to a sound, public policy. In most of these *quasi* illegal contracts, the essence of the difficulty, the element which renders them obnoxious to criticism, and exposes them to judicial condemnation, consists in the existence of such relations between the two contracting parties that the beneficial interests of one party derived from the agreement itself, are inherently and necessarily opposed to and clashing with his duties towards the other, growing out of those relations; so that, in making a contract, an opportunity

(1) *Cooth v. Jackson*, 6 Ves. 12.

(2) *Wethwold v. Walbank*, 2 Ves. 233; if an officer's compensation is a stated salary, and the duties can be performed by a deputy, such salary may, perhaps, be assigned. [*Qu?*]

(3) *Johnson v. Ogilby*, 3 P. Wms. 276. Such agreements are valid in case of some inferior offenses.

(4) Story Eq. Jur. § 296.

(5) Story Eq. Jur. § 296, and cases cited in note.

is inevitably given, and a temptation almost irresistibly arises to overreach and obtain an advantage over that other party. As the opportunity is more convenient, and the temptation more powerful, so is the inclination and tendency of the courts more firm and absolute to withhold the remedy of a specific performance from such contracts. Of this kind are contracts in which the one obtaining the benefit stands in a position of trust and confidence towards the other, whether the trust be express or results from some existing relation, as those by a parent with a child, by a guardian with a ward, by an attorney with his client, by a trustee with his beneficiary. Such agreements are always enforced with the most extreme caution, and with the greatest reluctance;(1) and if the confidential relation is strictly a legal one, and is incompatible with any such dealings between the parties, their performance will be altogether refused; as, for example, an agreement with a corporation made by a director thereof for his own benefit, concerning matters which are within the corporate powers and under the control of the directors as managing agents of the company. A contract of this kind will not be enforced.(2) In the same general class are contracts, already mentioned in a preceding section, concerning their expected inheritance, reversions, etc., made with heirs and reversioners, during the life of their ancestors, or life-tenants. Although such agreements are not strictly illegal, yet they are regarded with suspicion, and are enforced only after the most conclusive proof of good faith, fairness, and right dealing. The burden of proof to make out these qualities rests upon the party claiming the benefit of the bargain.(3)

SEC. 286. As has already been stated, courts set aside or refuse to enforce illegal contracts, in general, not from any regard for the objecting party, nor from a desire to protect *his* individual interests, but from reasons of public policy. Where two persons with equal

(1) See Story Eq. Jur. §§ 307-327; *Griffiths v. Robins*, 3 Madd. 191.

(2) *Flanagan v. Great Western Ry. Co.*, L. R. 7 Eq. 116, per GIFFARD, V. C. The defendant, a railway company, owned a refreshment room at a station; the plaintiff, a director of the company, contracted for a lease of said refreshment room, for the benefit of a firm of which he was a member. *Held*, not in any case enforceable. Here the corporation had power to lease the room, and the matter of leasing it came under the general control of the directors as a body. Plaintiff's duties as a director to lease it for the highest possible rent, etc., necessarily clashed with his interests as lessee to get the property for as small a rent, and at as good terms for himself as possible.

(3) Story Eq. Jur. § 336, note; *Twisleton v. Griffith*, 1 P. Wms. 310; *Cole v. Gibbons*, 3 P. Wms. 293; *Bowes v. Heaps*, 3 V. & B. 117; *Walmesley v. Booth*, 2 Atk. 27; and see *ante*, § 191.

knowledge and equally participating in the fault, have entered into an illegal agreement, and one of them has obtained by the other's voluntary act all the benefit of it for himself, his refusal to perform on his own part is, generally considered in itself alone, unjust and inequitable; but the law sustains him in this position, because it takes into account the interests of society and of the state, which demand the complete suppression of such agreements. The objection which prevails and avoids the illegal contract comes not from the individual litigant, but from the public at large who speak through the courts.(1) Whenever, therefore, in a suit for specific performance, the illegality, not having been alleged in the pleadings, is disclosed for the first time by the evidence, the court will on its own motion pursue the investigation, and, if the fact is established, refuse to enforce the agreement.(2) There is some conflict in the judicial opinions concerning the certainty with which the illegality must be established. According to one theory, the agreement must appear with a reasonable degree of certainty to be legal; according to the other, the illegality must be shown. In other words, does the burden lie upon the party affirming the contract to be legal, or on the one alleging it to be illegal? It would seem that, upon principle, the latter view is the correct one.(3)

SEC. 287. From the nature of the objection, as not resting upon any motives of concern for the individual interests of the party making it,

(1) See *Holman v. Johnson*, Cowp. 343, per Lord MANSFIELD: "It is not for the defendant's sake that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice between him and the plaintiff—by accident, if I may so say." If an award directs the doing of an illegal act, it will not be enforced, while if it directs merely an *unreasonable* one, it will be enforced, because the parties have selected their own judge and must abide by his decision, unless it requires a direct violation of the law. *Wood v. Griffith*, 1 Sw. 43.

(2) *Parken v. Whitby*, T. & R. 366; *Evans v. Richardson*, 3 Meriv. 469.

(3) In *Johnson v. Shrewsbury, etc., Ry. Co.*, 3 DeG. M. & G. 914, KNIGHT-BRUCE, L. J., stated the rule that an agreement would not be specifically enforced unless the court was "satisfied that there was not a reasonable ground for contending that it is illegal or against the policy of the law." But in *Aubin v. Holt*, 2 K. & J. 66, 70, PAGE WOOD, V. C. (afterwards Ld. Ch. HATHERLEY), said: "The agreement must be legal or illegal, and it is not within the discretion of the court to refuse specific performance because an agreement *savors* of illegality; it must be shown to be illegal." This theory is certainly in accordance with the general view stated in the text, that the defense of illegality is often an unrighteous one, which the courts do not favor, and never sustain out of regard to the party urging it. If this be true, the burden most clearly ought to rest upon the one who alleges the illegality.

it follows that where such party has already enjoyed the benefits of the contract, the defense of its illegality, set up by him, is not regarded with much favor by the courts.(1) Its operation is confined within the exact limits prescribed by the law, and is not extended by a liberal construction, or by implication, so as to reach beyond the very terms and scope of the objectionable agreement itself. It results from this restrictive mode of dealing with illegal contracts, that other relations may be based upon or follow from them—consequential rights and obligations may arise from them—which will be recognized and enforced notwithstanding the illegal origin from which these relations, rights, and duties are derived, or with which they are connected. In order, however, that such legal relations may arise incidentally from an illegal contract, the illegality itself must not be of a nature intrinsically immoral or evil—a *malum in se*; it must be an illegality resulting from motives of expediency or policy. The following are some illustrations of this principle. A contract may be illegal and, therefore, incapable of enforcement, but a separate trust, lawful in itself, may be created ancillary to that agreement, referring to it, and for the very purpose of carrying it into effect. Such trust may be executed by a decree of the court, although its execution necessarily involves and includes a specific performance of the antecedent contract.(2) Again, an illegal contract may be voluntarily carried into effect by an act which, in its own nature, is perfectly legal, and this act, though resulting from an unlawful source, may be a valid consideration of a legal and binding agreement; as, for example, although an agreement to transfer stocks may be illegal, under the statutes in relation to stock-jobbing, yet the actual transfer of the stocks in pursuance of it is not intrinsically an unlawful act, and may be the consideration of another lawful contract.(3) And again, if a trust

(1) *Shrewsbury, etc., R'y Co. v. London & N. W. R'y Co.*, 16 Beav. 441.

(2) This proposition, of course, assumes that the power of creating express trusts has not been restricted by statute. In New York and many other states, where express trusts have been limited to certain specified objects, it may be that such a case could not arise, simply because the appropriate trust to carry the contract into effect would not be possible. *Powell v. Knowler*, 2 Atk. 224, is an illustration of the text. A. and B. had entered into an agreement for the division and conveyance to each other of parts of certain land which they expected to recover. This contract was champertous and illegal, and could not, *as a contract*, be enforced. But one of the parties, who had agreed to convey a portion of the land to the other, by a clause in his will directed the agreement to be performed and created a trust for that purpose. This trust was enforced against the trustee, although the original contract was also thereby specifically performed.

(3) *McCallan v. Mortimer*, 9 M. & W. 636.



should be created whereby A. was illegally to pay money to the trustee B. for the benefit of C., the beneficiary could not compel A. to make the payment; but if A. should voluntarily pay over the money into the hands of B., such trustee could not set up the illegality of the trust as a defense to a claim for it made upon him by the beneficiary.(1)

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#### FOURTH GROUP.

*Those incidents which relate to or are connected with the actual enforcement of a decree, and which require that a specific performance should be practicable.*

SECTION 288. In considering the various conditions under which a contract must exist, or the qualities which it must possess in order that the equitable remedy of specific performance may be granted, we are now brought to the last of the series—a specific *performance must be practicable*. The features and incidents which have been examined in the foregoing sections of the present chapter belong to the contract itself, to its terms, its subject-matter, or the conduct of the parties which led up to and influenced its conclusion; and they may be roughly divided into two general groups—those which more immediately affect the validity and binding efficacy of the agreement, and those which concern its equitable nature, its moral character, its relations to right and justice. The attributes and features which yet remain to be examined primarily belong, on the other hand, to the remedy, or to the judicial act of decreeing it, and whatever connection they may have with the contract, is merely incidental and partial. The practicability or impracticability of the remedy must necessarily depend upon three different kinds of circumstances, and this three-fold division furnishes a natural classification and order which the discussion will pursue. 1. *The peculiar nature of the contract*.—Although the court may have all the means of enforcing a specific performance, and the defendant may be legally and physically able to perform, yet the contract may be such that by its very terms the performance, when completed, would be wholly nugatory.

(1) *Thomson v. Thomson*, 7 Ves. 470; *Tenant v. Elliot*, 1 B. & P. 3. See *Tracy v. Talmage*, 14 N. Y. 162, in which the doctrine, as to the enforcement of illegal contracts, is discussed in the most exhaustive manner by SELDEN and COMSTOCK, JJ.

This is true of agreements which are revocable at the pleasure of the defendant. The number of cases embraced in this class is comparatively very small. 2. *The incapacity of the defendant.*—Although the contract may be legally valid, and its terms such as are capable of performance, and although the court may be fully competent to enforce the performance of such a contract, yet in a particular instance the defendant may be so related to the subject-matter that a specific performance of his stipulations is absolutely impossible. For example, he may have agreed to convey a specified farm to A., and before executing may have conveyed it to B., who is a *bona fide* purchaser without notice, and cannot be compelled, and will not consent, to rescind and give up his purchase. In such a case a specific performance for the benefit of A. is manifestly impossible through the defendant's incapacity, and the injured party must be left to his legal action for damages. 3. *Incapacity of the court.*—Finally, although the contract may be valid, and in its nature capable of being performed, and the defendant competent to perform, the court may be unable, by its ordinary administrative instruments, and with any reasonable exercise of its judicial and executive functions, to enforce and carry into effect the decree which it might render. Although the rendering a decree ordering such and such acts to be done may be easy, still, if the court has no means and instruments for making its decision effective, and compelling obedience to its mandates, its decree would be nugatory, and will not be granted. I shall take up these three cases separately in the order as now stated, premising that in all other instances contracts, if they conform to the requirements described in the preceding sections of this chapter, will be specifically enforced.

## SECTION XVI.

*The nature of the contract : It must be such that its specific performance would not be nugatory.*

SECTION 289. In all the instances of this class, it is assumed that a specific execution of the agreement is possible ; that so far as depends upon its terms, the capacity of the defendant, and the power of the court, a decree could be made and carried into effect by which the party would do exactly what he had promised to do ; but still, this whole proceeding might be nugatory, because, from the stipulations or essential nature of the contract, the defendant may at any time before or after the decree free himself from the obligation, and

thus render the contract a nullity. This is the case with all agreements which, either from their essential character or from special stipulations, are revocable at the option or pleasure of the party against whom the remedy is sought. If the defendant can at will terminate the contract, and throw off every duty arising from it, and thus make a decree of the court without any efficiency, it is plain that specific performance would be an idle and useless proceeding.(1) The following are the important examples of such revocable contracts.

SEC. 290. It is well settled, as a general rule, that an agreement to enter into a partnership which would be literally performed by executing the partnership articles, or to carry on a partnership already established, will not be specifically enforced.(2) A court of equity will certainly never interfere where no period has been fixed by the agreement for the duration of the firm, since either partner may then dissolve at will, and thus terminate the contract and make the decree an empty form.(3) In some cases, however, which were special and exceptional, an agreement to enter into a partnership has been specifically enforced by compelling the execution of partnership articles; but the mere fact that a fixed period for the duration of the firm is stipulated for, is not of itself a sufficient ground for granting the remedy.(4)

SEC. 291. Another instance of the same general class is that of agreements to submit matters in controversy to arbitration, which are not specifically enforced because they may be revoked at any time before the award is completed, and the power delegated to the arbitrators withdrawn, although the award itself after it has been made may be performed by a court of equity.(5) On the same principle a

(1) See *Tobey v. County of Bristol*, 3 Story, 800.

(2) *Scott v. Rayment*, L. R. 7 Eq. 112, per GIFFARD, V. C.; *Buck v. Smith*, 29 Mich. 166; *Meason v. Kaine*, 63 Pa. St. 335 (verbal contract to enter into a partnership to trade in lands).

(3) *Hercy v. Birch*, 9 Ves. 357; *Sheffield Gas Consumers Co. v. Harrison*, 17 Beav. 294; *Stocker v. Wedderburn*, 3 K. & J. 393; *Syers v. Syers*, L. R. 1 App. Cas. 174; *Wadsworth v. Manning*, 4 Md. 59; *Reed v. Vidal*, 5 Rich. Eq. 289; *Buck v. Smith*, 29 Mich. 166; *Meason v. Kaine*, 63 Pa. St. 335. A specific performance has been refused where the contract did not determine the amount of the capital nor the manner of obtaining it. *Downs v. Collins*, 6 Hare, 418, 437.

(4) *Anon.*, 2 Ves. Sen. 629; *England v. Curling*, 8 Beav. 129; *Wilson v. Campbell*, 5 Gilm. 383. And see *Crawshay v. Maule*, 1 Sw. 513; *Nesbitt v. Meyer*, 1 Sw. 226.

(5) *Price v. Williams*, cited in 6 Ves. 818; *Street v. Rigby*, 6 Ves. 815; *Wilks v. Davis*, 3 Meriv. 507; *Gervais v. Edwards*, 2 Dr. & W. 80; *Conner v. Drake*, 1 Ohio St. 166; *King v. Howard*, 27 Mo. 21; *Tobey v. County of Bristol*, 3 Story, 800, 820, 823.

court of equity will not specifically enforce an agreement to execute and deliver to the plaintiff some instrument in writing, if such instrument when executed must contain a stipulation which, having been already broken by the plaintiff, would make him liable to forfeit at once all benefit under it. The ordinary case is that of an agreement to give a lease which must contain a condition that has already been broken by the intended lessee, so that as soon as the lease was executed and delivered the defendant could re-enter and put an end to the letting.(1) Whenever in a suit for the specific execution of such an agreement to give a lease, it is left fairly doubtful on the evidence whether the condition has in fact been broken by the plaintiff—the lessee—the court, instead of refusing relief, will direct the lease to be executed and ante-dated the time of the alleged breach, and make it a condition that the plaintiff, when made a defendant in any action at law which may be brought by the lessor to try the question of the alleged breach, should in such action admit the execution of the lease as of that date, so that the issue may be fairly presented upon the breach of the condition alleged by the lessor.(2) A voluntary, post-nuptial agreement to make a settlement will not be specifically enforced, however; among other reasons, so long as it is executory it is revocable by the party upon whom the duty of performance would rest.(3) In England agreements to grant or admit to certain offices are revocable, and are therefore not enforceable in equity.(4)

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## SECTION XVII.

### *The incapacity of the defendant to perform.*

SECTION 292. In all the instances of this class it is assumed that there is no difficulty in the way of a specific enforcement, inherent in the terms of the contract considered generally, nor resulting from any failure of the administrative functions residing in the court; but that on account of some personal condition or relation of the defendant, it

(1) *Jones v. Jones*, 12 Ves. 188, per Sir Wm. Grant; *Gregory v. Wilson*, 9 Hare, 683; *Lewis v. Bond*, 18 Beav. 85; *Rankin v. Lay*, 2 DeG. F. & J. 65; *Pain v. Coombs*, 1 DeG. & J. 34; *Lillie v. Legh*, 3 DeG. & J. 204.

(2) *Rankin v. Lay*, 2 DeG. F. & J. 65, 72; *Pain v. Coombs*, 1 DeG. & J. 34; *Lillie v. Legh*, 3 DeG. & J. 204.

(3) *Andrews v. Andrews*, 28 Ala. 432.

(4) *Wheeler v. Trotter*, 3 Sw. 174, n.; and see *Sturge v. Midland Ry. Co.*, 6 W. R. (1857-8) 233.

is impossible for him to do what he has undertaken to do. In other words, if this personal incapacity of the defendant were removed, a specific performance of the agreement would be perfectly practicable. It is plain that if the courts, under such circumstances, refuse to grant the remedy, their refusal is not based upon any considerations of favor towards the defendant, nor upon the justice of his case; but entirely upon the inexpediency and impropriety of courts rendering decrees which they know must remain unexecuted, since the defendants cannot be compelled to obey them. The incapacity of the defendant may be total or partial; that is, he may be unable to perform any portion of the contract, or he may be unable to perform a certain part of it only. These two conditions will be examined separately.

SEC. 293. *First. Where the defendant's incapacity is total.*—The general doctrine is well established, and from the very nature of the case it could not be otherwise that the absolute inability of the defendant to perform his undertaking at all, when called upon by the court to do so, prevents a decree against him for its specific enforcement.(1) The remedy, however, is not necessarily confined to those agreements which may be performed when concluded, and which depend for their performance upon the will and consent alone of the parties without the intervention of third persons. It is not enough that the defendant's incapacity exists at the time of making the contract; it must also exist at the hearing; for if a person agrees to do a certain act which he is then unable to do, but he afterwards becomes clothed with the power, he will be compelled to perform—if the contract is not illegal—for he will not be allowed to say that he did not intend to acquire the interest, or estate, or other means necessary for the fulfillment of his engagement.(2) The mere fact that the defendant does not own or possess the subject-matter, will not, of itself, always constitute the legal impossibility intended by the rule;

(1) See *Green v. Smith*, 1 Atk. 573, per Lord HARDWICKE; *Columbine v. Chichester*, 2 Phil. 27; *Ellis v. Colman*, 4 Jur. (N. S.) 350; *Denton v. Stewart*, 1 C. & F. 238; *Hallett v. Middleton*, 1 Russ. 243. For cases where a specific performance was refused on the ground of the difficulty of performance, see *Phillips v. Stauch*, 20 Mich. 369; *Burke v. Seely*, 46 Mo. 334.

(2) *Carne v. Mitchell*, 15 L. J. Ch. 287; *Clayton v. Duke of Newcastle*, 2 Cas. in Ch. 112; *Browne v. Warner*, 14 Ves. 412; *Greenaway v. Adams*, 12 Ves. 401; *Coffin v. Cooper*, 14 Ves. 205; *Hull v. Vaughan*, 6 Price, 163; *Hollis v. Carr*, Freem. 5. Even when an application to the legislature is necessary to render the contract enforceable, this rule is sometimes acted upon. See *Great Western R'y Co. v. Birmingham, etc., R'y Co.*, 2 Phil. 597; *Hawkes v. Eastern Counties R'y Co.*, 1 DeG. M. & G. 756, per Lord ST. LEONARDS; *Devenish v. Brown*, 26 L. J. Ch. 23; *Frederick v. Coxwell*, 3 Y. & J. 514.

in certain contracts he is bound to purchase the subject-matter by means of which he may carry out his undertaking, which will, therefore, under such circumstances, be enforced.(1) Such cases are necessarily confined to contracts whereby the defendant has undertaken to use the subject-matter in a certain manner—as, for example, to give security in a certain amount upon land; they cannot be extended to contracts whereby the defendant has undertaken to sell and convey a certain specific thing which he does not own, and which he cannot be compelled to acquire by any legal means. Where the incapacity is legal and absolute, there can be no decree; and this would be the case if the defendant had contracted to sell and convey, or lease, some specific thing which he did not own.

SEC. 294. An incapacity which did not exist when the contract was made, may subsequently arise from the defendant's own act or default, even when such act or default was intentional; as, where a vendor having contracted to sell his land to A., should put it out of his power to fulfill by a subsequent conveyance of the land to B., a *bona fide* purchaser, without notice and for a valuable consideration.(2) If the defendant has thus, by his own act, incapacitated himself from performance, the court of equity may, instead of dismissing the plaintiff's suit, award him the legal remedy of damages.(3) On the other hand, the impossibility of performance may exist from the beginning, as where the defendant had no title to interest in or authority over the

(1) *Walker v. Barnes*, 3 Mad. 247, where defendant had agreed to give certain real estate security, and claimed that he did not own sufficient land, and it was held that he must purchase land of a sufficient value.

(2) *Denton v. Stewart*, 1 Cox, 258; *Greenaway v. Adams*, 12 Ves. 395, 400; *Ferguson v. Wilson*, L. R. 2 Ch. 77; *Helling v. Lumley*, 3 DeG. & J. 493, 498; *Gupton v. Gupton*, 47 Mo. 37; *Smith v. Kelly*, 56 Me. 64. It was held in *Warren v. Richmond*, 53 Ill. 52, and *Little v. Thurston*, 58 Me. 86, that a sale or conveyance of the land by the vendor to a third person, operates as a rescission of a prior contract of sale; but this, of course, only means that the prior vendee is thereby authorized to treat it as rescinded. Whenever the vendor, after having agreed to sell the land to A., enters into a second agreement to sell it to B., or conveys it to B., under such circumstances that the latter is not a *bona fide* purchaser without notice of A.'s rights, A. can enforce a specific performance against B. This doctrine is discussed at length in a subsequent section. See *Bird v. Hall*, 30 Mich. 374; *Cole v. Cole*, 41 Md. 301; *Snowman v. Harford*, 57 Me. 397; *Bryant v. Booze*, 55 Geo. 438; *Fullerton v. McCurdy*, 4 Lans. 132; *Haughwout v. Murphy*, 7 C. E. Green, 531; 6 ib. 118; *Gregg v. Hamilton*, 12 Kans. 333; *Johnson v. Bowden*, 37 Tex. 621; *Youell v. Allen*, 18 Mich. 108.

(3) *Woodcock v. Bennett*, 1 Cow. 711; *Greenaway v. Adams*, 14 Ves. 395, 400. See the subject discussed at large, *post*, §§ 468–470. But such suit will not be entertained in equity for the sole purpose of giving damages, when the plaintiff knows that a performance is impossible. *Gupton v. Gupton*, 47 Mo. 37.

particular land, chattels, or other thing to which his agreement relates, and no legal means of acquiring the title or authority. Performance in such a case will not be decreed, because the defendant cannot be compelled to purchase the specific thing.(1)

SEC. 295. Performance depending upon the consent of a third person. Where a defendant enters into a contract, the execution of which depends upon the voluntary consent of a third person, and such consent is refused, as there are no legal means of compelling it to be given, the performance becomes an impossibility, and will not be decreed.(2) The mere fact that such consent is necessary does not, of course, constitute any defense, for it may be given. In conformity with this rule, it is settled that if a husband alone, or husband and wife together, agree to convey the estate of the wife, and she afterwards refuses to complete, a court of equity will not specifically enforce the contract.(3) If, however, there has been any misleading, or mis-

(1) *Columbine v. Chichester*, 2 Phil. 27; *Ellis v. Colman*, 4 Jur. (N. S.) 350; *Hallett v. Middleton*, 1 Russ. 243. Failure of title in the vendor is a common defense. See *Avery v. Griffin*, L. R. 6 Eq. 606. Vendor, a trustee to sell, was a married woman, and her contract *held* could not be enforced. *Love v. Cobb*, 63 N. C. 324. A vendor cannot be decreed to remove incumbrances over which he has no control. *Jerome v. Scudder*, 2 Roberts. 169. Where the vendor is unable to complete, on account of his title proving to be defective, but the vendee is in possession and insists upon a performance by the vendor, and refuses to surrender the possession because he himself has not been in fault, it seems the court will not interfere, but will leave the parties to their remedies at law. *Mullins v. Hussey*, 12 Jur. (N.S.) 636; and see *Davison v. Perrine*, 7 C. E. Green, 87; *Foley v. Crow*, 37 Md. 51; *McIndoe v. Morman*, 23 Wis. 588; *Marshall v. Caldwell*, 4 Cal. 611.

(2) *Grey v. Hesketh*, AmbL. 268; *Howell v. George*, 1 Mad. 1; *Marsh v. Milligan*, 3 Jur. (N. S.) 979; *Beeston v. Stutely*, 6 W. R. (1857-8) 203. For case of a contract becoming impossible to perform by the death of a person agreed upon to fix the amount to be paid, see *Firth v. Midland R'y Co.*, L. R. 20 Eq. 100.

(3) *Bryan v. Woolley*, 1 Bro. P. C. 184; *Emery v. Wase*, 8 Ves. 505; *Frederick v. Coxwell*, 3 Y. & J. 514; *Howell v. George*, 1 Mad. 1; *Brick v. Whelly*, 1 Mad. 7, n.; *Martin v. Mitchell*, 2 J. & W. 413, 425; *Castle v. Wilkinson*, L. R. 5 Ch. 534; *Nicholl v. Jones*, L. R. 3 Eq. 696; *Clark v. Reins*, 12 Gratt. 98; *Young v. Paul*, 2 Stockt. Ch. 401; *Welsh v. Bayaud*, 6 C. E. Green, 186. There is a direct conflict in the rules adopted by the courts of different states in respect to the case where a husband contracts to convey his land, and his wife refuses to join in the conveyance so as to release her inchoate right of dower and make an unincumbered title. According to the rule, as laid down in some of the states, the purchaser has no remedy in equity other than to compel a conveyance by the husband alone and pay the full price as agreed; he cannot demand any compensation from the vendor by way of abatement, unless, indeed, the vendor has acted in bad faith, and has himself procured his wife to interpose the obstacle of her refusal. See, to this effect, *Burke's Appeal*, 75 Pa. St. 141; *Reilly v. Smith*, 25 N. J. Eq. 158; *Peeler v. Levy*, 26 N. J. Eq. 330 (husband procuring his wife to refuse); *Riesz's Appeal*, 73 Pa. St. 485; *Burk v. Serril*, 80 Pa. St. 413. In *Iowa* a contract by a

representation, or concealment, or other unfair conduct towards the vendee, the husband may be compelled to convey his own life interest, with a compensation.(1) These decisions are, of course, based upon the wife's common-law incapacity to make a binding contract, and would, doubtless, not be followed in those American states where the wife has been clothed with full power to contract with reference to her own property.

SEC. 296. *Partial or substantial enforcement.*—The defense of the defendant's incapacity is, of course, not favored, and the court is strongly inclined to compel the performance of a contract according to its substance—if this be possible—when, for any reason, the defendant is incapacitated from a literal fulfillment. This tendency is shown in several classes of cases. Where certain contracts have been made illegal by statute, the thing to be done being simply *malum prohibitum*, and not *malum in se*, the courts have allowed the parties to accomplish the same object by varying the form of the agreement so that it does not fall within the exact terms of the prohibition ;(2) or when

husband alone to convey a "homestead" is void, and will not be enforced even against him. This results from the peculiar provisions of the statutes regulating "homesteads." *Barnett v. Mendenhall*, 42 Iowa, 296. In other states another rule prevails, and the refusal of the vendor's wife to release her dower either enables the vendee to rescind or to enforce with compensation. See *Heimburg v. Ismay*, 35 N. Y. Super. Ct. 35 ; *Zebly v. Sears*, 38 Iowa, 507. For a case where the vendor contracted to sell land, the legal title of which he held in trust for his wife, the contract being made at her request, and a conveyance by him being decreed free from her right of dower, see *Rostetter v. Grant*, 18 Ohio, St. 126. A wife's contract, made jointly with her husband, whereby she agreed to convey her own land, may be enforced against her in equity, where the vendee has paid the price, taken possession with her consent, and made improvements ; the land will be charged with the amount paid and expended by the vendee. See *Frarey v. Wheeler*, 4 Oreg. 190. This decision is based upon the general power of a court of equity, and not upon any statutes enlarging the capacity of wives to bind themselves by contract. It was the ancient practice of the court, however, to order the husband to procure his wife's consent, and to imprison him until he succeeded. See *Barrington v. Horn*, 5 Vin. Abr. 547, pl. 35 ; 2 Eq. Cas. Abr. 17, pl. 7 ; *Hall v. Hardy*, 3 P. Wms. 187 ; *Daniel v. Adams*, Ambl. 495 ; *Morris v. Stephenson*, 7 Ves. 474.

(1) See *post*, § 461.

(2) For example, the statute (32 Hen. viii, ch. 9), forbids the sale of a pretended right to land by a person not in possession ; so that a contract which in terms purported to sell and convey the interest which the vendor claimed to have, he not being in possession (and the interest not falling within any of the exceptions), would be illegal. But if, instead of thus purporting to sell an asserted interest in the land, the person should simply undertake to convey a piece of land on a future day named, and when the day arrives he has acquired possession, such a contract does not come under the statutory prohibition, and is held to be binding. *De Medina v. Norman*, 9 M. & W. 820.



a performance, according to the literal terms, is illegal, they will, if possible, enforce the substantial purpose of the contract, while departing from its exact language, so as to escape from the statutory prohibition.(1) If a contract, valid when made, has been rendered illegal by subsequent legislation, the tendency of the court will be even more marked to execute its substance, if possible, so as not to bring the performance within the exact and literal prohibitions of the statute.(2)

SEC. 297. Where there is no element of illegality in the contract, but the defendant is incapacitated from performing it exactly and literally according to its precise terms, if it is otherwise one which ought to be enforced, the courts will, if possible, decree a specific execution according to its substance, by making such variation from unessential particulars as the circumstances of the case require or permit. It is a fundamental principle that in granting the relief of specific performance, a court of equity will, if necessary, distinguish between the essential and the non-essential stipulations; and, while enforcing the former may disregard the latter, and award in place of the omitted terms a suitable compensation. The cases illustrating this practice are numerous, and some of them are collected in the foot-notes; in fact all the instances of a compensation, where there has been some defect or failure in carrying out the agreement literally, are examples.(3)

(1) The case of *Carolan v. Brabazon*, 3 Jon. & Lat. 200, is an illustration. It had been made illegal, by statute, for a tenant in his contract for a lease to stipulate to pay the tithe-rent charge; in an agreement for a lease it was stipulated that the tenant should pay a certain sum as rent, and also the tithe-rent charge, which was a certain other sum. This contract could not, of course, be literally enforced. The court, however, granted a specific performance by ordering a lease which reserved as rent a sum equal to the two amounts named in the contract, and calling it all "rent"—the lessee thus paid the amount he agreed to pay, but no part of it was paid *under the name of* "tithe-rent charge."

(2) *Bettesworth v. Dean and Chapter of St. Paul*, Sel. Cas. in Ch. 66. The corporation had covenanted to renew a lease for ninety-nine years—subsequently and before the time for renewal a statute prohibited leases by such bodies for so long a term; the covenant was enforced, as far as possible, by compelling the corporation to renew for a term as long as they could lawfully grant under the statute.

(3) *Carey v. Stafford*, 3 Sw. 427, n.; *Paxton v. Newton*, 2 Sm. & Gif. 437; *Errington v. Aynesly*, 2 Bro. C. C. 341; *Davis v. Hone*, 2 Sch. & Lef. 351; *Frederick v. Coxwell*, 3 Y. & J. 514. Cases of contracts with projected railway companies, viz., *Stanley v. Chester R'y Co.*, 9 Sim. 264; 3 My. & Cr. 773; *Greenhalgh v. Manchester, etc., R'y Co.*, 9 Sim. 416; 3 My. & Cr. 784; *Earl of Lindsay v. Great Northern R'y Co.*, 10 Ha. 664. See the section on partial enforcement and compensation in chapter 3, *post*.

SEC. 298. *Second. Where defendant's incapacity is partial.*—The incapacity may, by the very terms of the contract, extend to a part of it only, while he is fully able to execute the other part. This condition supposes that the agreement is separable, and is distinguishable from that examined in the two preceding paragraphs, where the inability of the defendant to carry out the agreement according to its exact and literal terms extends to its whole scope, and the whole contract is, therefore, more or less modified in the decree for performance. Under the condition now to be considered, the agreement consists of two or more parts, some of which the defendant is capable of performing, and the other he is incapable. The most important kind of agreements presenting the questions, are those which are framed in the alternative, and which, by the express terms, give the defendant an election which one of these alternatives he will adopt and carry into operation. If the defendant was originally, or subsequently becomes, incapacitated from performing one of these alternatives, the question arises: Is he bound to execute the other, in respect to which there is no such incapacity? It will be noticed, that the only element of the agreement which can occasion any doubt or question as to the liability, is the express right of election originally given to the party; because, if the inability to perform one alternative necessarily forces him to adopt the other, then the power of election is taken away. In answering the question, it will be found that the defendant's liability depends upon the nature of the extrinsic circumstances which made it impossible to perform one of the alternatives. These different circumstances will be considered separately.

SEC. 299. 1. *Where one alternative is impossible ab initio.*—If the incapacity existed in respect to one of the alternatives from the very beginning—at and from the time of concluding the agreement—whether on account of its illegality or other cause, then the right of election is *ipso facto* destroyed—the bestowal of it is a nullity—and the obligation to perform the other alternative is as single and complete as though it constituted, in form, the entire contract.(1)

SEC. 300. 2. *Where an alternative originally possible becomes impossible by the act of God.*—If the defendant's incapacity to perform one alter-

(1) *Wigley v. Blackwal*, Cro. Eliz. 780; Com. Dig. Condit. K. 2; *Da Costa v. Davis*, 1 B. & P. 242, where a bond was conditioned either to pay a sum named, or to do something which was held by the court to be illegal, and the defendant bound to do the other—*i. e.*, pay the sum. *Simmonds v. Swaine*, 1 Taunt. 549, an award ordered a sum of money to be paid, or to be secured, not specifying the kind or amount of the security. *Held*, that, although this alternative was void for uncertainty, the other should be performed.

native arises after the conclusion of the agreement from an act of God, it cannot be laid down as a universal rule, that because of his right of election he is absolved from executing the other alternative, although this doctrine has been judicially announced.(1) In the absence of any provision or language of the contract showing a contrary intention, the defendant cannot be forced to adopt and carry out the other alternative, because the election was expressly given to him; he is not in fault, and it would be inequitable to visit on him the entire weight of the providential event. The court, however, will be guided by the intention of the parties as shown in their agreement. If from any provision, or from the whole contract, the intention fairly appears that the other and possible alternative should be performed, notwithstanding the act of God which has cut off all power of election, such intention will be followed, and carried into effect if necessary by a decree for a specific execution.(2)

SEC. 301. 3. *Where one alternative originally possible becomes impossible by the act of the plaintiff.*—If the defendant, originally capable of performing either alternative, is rendered incapable of performing one of them by the act of the plaintiff, on the plainest principles of justice and equity, he is thereby relieved from all obligation, and is not bound to carry out the other alternative; because the party to be benefited by the contract has himself destroyed the power of election which the agreement expressly gave. Under such circumstances, the defendant's liability is discharged even at law as well as in equity.(3)

(1) In *Laughter's Case*, 5 Co. Rep. 21, b. ; also, *sub. nom.* *Eaton's Case*, Moore's 357; *sub. nom.* *Eaton v. Laughter*, Cro. Eliz. 398, it was said by the court, as reported: "Where the condition of a bond consists of two parts in the disjunctive, and both are possible at the time when the bond was made, and afterwards one of them becomes impossible by the act of God, the obligor is not bound to perform the other part." See, also, *S. P.* in *Warner v. White*, T. Jon. 95.

(2) The doctrine quoted in the last note is now held to be incorrect, if stated as a universal rule. It was a mere *dictum*; the case called for no such decision, for both alternatives were, in fact, impossible. See *Barkworth v. Young*, 4 Drew. 1, 24, and also the report of the case in Cro. Eliz. 398. That the liability of the defendant to perform or not the second alternative depends upon the intent of the parties, as gathered from the whole agreement, is fully settled by subsequent cases. See *Studholme v. Mandell*, 1 Ld. Raym. 279; *Anon.* 1 Salk. 170; *Drummond v. Duke of Bolton*, Say. 243; *More v. Morecomb*, Cro. Eliz. 864. The principle which underlies this question was fully discussed and most clearly stated in *Barkworth v. Young*, 4 Drew. 1, 25, by KINDERSLEY, V. C. But see *Jones v. How*, 7 Hare. 267; 9 C. B. 1.

(3) *Grenningham v. Ewer*, Cro. Eliz. 396, 539, which held that where an obligor is bound by his bond to do one or the other of two things, and the obligee disables him from performing one of them, the law discharges him from the other. *Basset v. Basset*, 1 Mod. 265; 2 Mod. 200; Com. Dig. Condition, K. 2.

If, however, the incapacity to perform one alternative has resulted from the defendant's own act, omission, or default, it is equally clear that he can be compelled to execute the other. His own conduct in rendering one alternative impossible is a virtual election to adopt the other, and he cannot be heard to plead an incapacity which he himself has caused, while there is another way open for him to fulfill his engagement. It is only when defendant has deprived himself of all power to carry out his agreement, in any manner, that a court of equity withholds its own remedy of specific enforcement and leaves the defendant to his legal liability for damages.

SEC. 302. 4. *Where one alternative originally possible becomes impossible by the subsequent act of a stranger.*—If the defendant's incapacity to perform one of the alternatives is thus caused by the subsequent act of a third person, without the aid or procurement or consent of the plaintiff, then, as it seems, he remains bound to carry out his contract by performing the other alternative. The case is the same in its result, and perhaps in its principle, as that in which one of the alternatives is impossible from the beginning.(1)

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## SECTION XVIII.

### *Incapacity of the court to enforce a performance.*

SECTION 303. This species of impracticability in granting the equitable remedy, which is much more important and extensive in its application than either of those described in the two foregoing sections, assumes that the contract is valid, and that the defendant is able to do what he has undertaken to do, but that, through the want of the appropriate means and instruments, the court is unable, while pursuing its ordinary methods of administering justice, either to render a decree or to enforce the decree which it should make, and thus compel a specific performance of his agreement by the defendant. With respect to the nature or cause of the impossibility, these contracts are, therefore, divisible into two groups, or classes, namely, those having such provisions and terms that a court is unable to render

(1) See a case quoted in *Grenningham v. Ewer*, Cro. Eliz. 397, which held that if a person is obliged to convey certain lands, or to marry A. S. before a specified day, and before the day arrives a stranger marries A. S., then the obligor must convey the lands; but otherwise, if the obligee married A. S., for then the obligor would be freed from all liability.

a decree ordering their performance, and those having such provisions and terms that the court is unable to carry into effect the decree for a performance which it might make.

SEC. 304. *I. Those having such terms and provisions that the court is unable to render a decree ordering their performance.*—In all the cases which constitute this group, the difficulty lies in the subject-matter which is something which the court cannot ascertain by judicial proof, or cannot lay hold of, so as to define and establish the rights concerning it. If it were possible to accomplish this fundamental part of the decree, there would be no insurmountable obstacle to a specific execution. It may, therefore, be laid down as a general proposition, that when the subject-matter of a contract—that concerning which the stipulations are made—is of such a nature that the court of equity cannot, consistently with the contract itself, ascertain the rights of the parties by means of a judicial inquiry, or cannot define and establish these rights by its decree, a specific performance of the agreement will be withheld. The cases to which this principle has been applied are few ; but it would necessarily be extended to all new cases which should present the same inherent features. The following are certain species of agreements which have been passed upon, and which plainly fall under this general class.

SEC. 305. 1. Contracts relating to the manufacture or sale of secret medicines, and of all other commodities or processes whose composition or nature is a secret, where the agreement recognizes the secret and expressly or impliedly stipulates that it shall not be divulged or publicly exposed. The process being secret, and the agreement providing for its preservation, the court could not inquire into the process, or ascertain by evidence whether the terms had been violated, or define and establish the rights and duties of the parties, without defeating the main purpose, or one of the main purposes, of the contract. Such a contract will not, therefore, be affirmatively enforced, nor will its performance be negatively compelled by means of an injunction restraining its breach.(1)

SEC. 306. 2. *Contracts concerning a good-will.*—Contracts relating to a good-will alone—as for its sale or transfer—unconnected with the business and premises of which it is an incident, cannot be specifically enforced. A good-will is a mere advantage and not a right ; it is the tendency, from habit, of customers to resort to the same particular place where they have been accustomed to trade ; it is, therefore, entirely intangible and speculative, and is something which the court

(1) *Newberry v. James*, 2 Meriv. 446 ; *Williams v. Williams*, 3 Meriv. 157.

cannot lay hold of and control by its decree.(1) But where a transfer of the good-will is included with the sale of a business and premises to which it is incident, the whole contract will be affirmatively enforced, and the special stipulations of the vendor for the preservation and assignment of the good-will will be negatively executed by means of an injunction restraining him from setting up a new business at or near the place, or from designedly drawing off the customers in any other manner.(2) As an example of this rule, agreements for the sale of an attorney's business and good-will have been specifically enforced in equity ;(3) although their validity has been doubted by eminent judges.(4) It has been doubted in England whether the court of equity can decree a specific performance of the covenants contained in a "farming lease," because, as these stipulations relate to the mode of using and tilling the soil in a proper manner, the court is unable to decide the questions as to "good husbandry," which are thus raised.(5) There does not seem, however, to be a greater difficulty in such a case than is presented by any other, the decision of which turns upon questions of knowledge and skill, and must be largely based upon the testimony of experts.

SEC. 307. II. *Contracts having such terms and provisions that the court is unable to carry into effect its decree for a specific performance.*—In this class of agreements, which is by far the most numerous and important, the jurisdiction is declined, not because it is impossible to formulate a decree which shall *order* everything necessary for a complete performance, nor even because a compulsory execution of such decree is *absolutely*, and in the nature of things impossible, but because the enforcement of the decree would unreasonably tax the time, attention, and resources of the court, and thereby interfere too much with its public duties towards other suitors, and in the general administration of justice. Take the case, which is the extreme one, of a contract for

(1) *Bozon v. Farlow*, 1 Mer. 459; *Baxter v. Connolly*, 1 J. & W. 576; *Coslake v. Till*, 1 Russ. 376.

(2) *Darby v. Whittaker*, 4 Drew. 134, 139, 140; *Cruttwell v. Lye*, 17 Ves. 335; *Chissum v. Dewes*, 5 Russ. 29; *Shackle v. Baker*, 14 Ves. 468, and see cases cited *ante*, §§ 24, 25.

(3) *Whittaker v. Howe*, 3 Beav. 383; *Aubin v. Holt*, 2 K. & J. 66.

(4) *Candler v. Candler*, Jac. 231, per Lord ELDON; *Bozon v. Farlow*, 1 Mer. 459, per Sir WILLIAM GRANT; *Thornbury v. Bevills*, 1 Y. & C. C. C. 554, per KNIGHT-BRUCE, V. C.; *Gilfillan v. Henderson*, 2 Cl. & Fin. 1.

(5) *Rayner v. Stone*, 2 Eden, 128, per Lord NORTHINGTON; and for an analogous case, see *Starens v. Newsome*, 1 Tenn. Ch. 239, in which a contract to cultivate a certain crop in a particular manner, and to cut, cure, and deliver it in a prescribed mode, was held impossible to be specifically enforced.

the construction of an extensive line of railway. It is plain that a court of equity can render and put into a proper form a decree *ordering* the specific execution of this contract, with about the same ease that it can make a decree ordering the execution and delivery of a deed of conveyance with the requisite covenants and other provisions. It is also plain that, by means of a comprehensive and minute scheme of operations, prepared by experts, and by the help of special masters overseeing the work and reporting its progress from time to time, the court might enforce this decree, although months, or even years, should be required for its completion; but to do so would occupy the care, attention, and time of the court, to the exclusion of other matters, and to the manifest detriment of the public business. A judicial tribunal cannot thus sacrifice the interests of other suitors, and even of society, for any benefit which might accrue to individual parties. For this reason, rather than from any inherent and absolute impossibility, equity refuses to exercise its jurisdiction under such circumstances. In some cases, however, of special and exceptional contracts properly belonging to this class, where the inconvenience would be comparatively slight, and where its interference is demanded by well-settled principles, equity does exercise its jurisdiction and decree a specific performance.(1) The following are the important species of agreements in respect of which the remedy is generally declared to be impracticable.

SEC. 308. 1. *A continuing covenant* will not be negatively enforced by an injunction restraining its breach, when the acts alleged to be in violation of it are numerous, and each one of them would require a separate judicial examination—perhaps an action at law—in order to ascertain whether it constituted a breach or not, and where the same controversy would arise with respect to every violation of the injunction; as, for example, a covenant not to sell water from a certain well *to the plaintiff's injury*.(2) In such a case, each alleged breach would require a separate controversy of fact. An injunction, in the very terms of the covenant restraining “sales to the injury of the plaintiff,” would not remove the difficulty, because the same question would arise upon every breach of it, viz., whether the plaintiff *was in fact* injured;

(1) See *ante*, §§ 22, 23.

(2) *Collins v. Plumb*, 16 Ves. 454; and see *City of London v. Nash*, 3 Atk. 512, 515. This rule was recognized and acted upon in *Caswell v. Gibbs*, 33 Mich. 331. A contract by defendant “never to tow vessels in competition” with plaintiff, it was held, could not be enforced by injunction; since every instance of alleged breach would require a separate investigation in fact to ascertain whether the defendant's act was really in competition with the plaintiff.

and an injunction restraining *all* sales would be broader than the covenant. The same obstacles would arise in the way of negatively enforcing every other continuing covenant or agreement of the kind described.

SEC. 309. 2. *Contracts for sale at a price to be fixed by valuers.*—

Wherever it is an essential part of a contract for the sale of property that its price is to be fixed by valuers, whose appointment is also therein stipulated for, a specific performance will not be decreed unless the amount has been determined according to the provision, and in such a final manner as to become a term of the contract. The parties having seen fit to rely upon the judgment of persons selected by themselves, the court has no legitimate means of making the award itself, or of directing it to be made by a master or an expert, for this would be substituting another contract in the place of the one to which the parties had assented. (1) It makes no difference whether the parties, or one of them, fail to appoint the valuers, or whether, on being appointed, they neglect or refuse to make an award, or whether one of the parties refuses to permit his nominee to go on. (2) If, however, the provision for a valuation is not an essential element of the agreement, but is merely collateral or incidental, or auxiliary to its main scope and purpose, the court will specifically execute the contract—if otherwise a proper one—and in so doing will, in some manner, fix upon the value. The strong tendency of the recent decisions is towards the construction of contracts so as to admit this latter rule, and to limit the operation of the doctrine as first stated. (3)

SEC. 310. 3. *Contracts for personal services.*—The instances embraced in the two foregoing subdivisions are rare ; those which follow are of constant occurrence. Contracts for personal services, where the acts stipulated for require special knowledge, skill, ability, experience, or the exercise of judgment, discretion, integrity and the like personal qualities, on the part of the employes, or where the services are confidential,—in short, wherever the full performance, according to the spirit of the agreement, rests in the individual *will* of the contracting party, courts of equity have no direct and efficient means of affirmatively compelling a specific execution ; at most, they could only order

(1) *Milnes v. Gery*, 14 Ves. 400 ; *Wilks v. Davis*, 3 Meriv. 507 ; *Collins v. Collins*, 26 Beav. 306 ; *Vickers v. Vickers*, L. R. 4 Eq. 529 ; *Richardson v. Smith*, L. R. 5 Ch. 648 ; *Earl of Darnley v. London, etc., R'y Co.*, 3 DeG. J. & S. 24 ; L. R. 2 H. L. 43 ; *Hopkins v. Gilman*, 22 Wisc. 476.

(2) *Ibid* ; *Vickers v. Vickers*, L. R. 5 Eq. 535.

(3) *Dinham v. Bradford*, L. R. 5 Ch. 519 ; *Jackson v. Jackson*, 1 Sm. & Gif. 184 ; *Richardson v. Smith*, L. R. 5 Ch. 648 ; *Smith v. Peters*, L. R. 20 Eq. 511.



the acts to be done and punish the defendant refusing by fine or imprisonment.(1) Such contracts may, however, according to the doctrine now universally established in the English equity courts, be negatively enforced by injunction whether they contain express negative stipulations or not; that is, whether the defendant specially agrees not to do certain acts, or only affirmatively undertakes to do certain other acts.(2) The rule was at one time settled in England, as well as in this country, that in agreements for purely personal services, such as described above, where the court could not decree an affirmative performance of the positive stipulation, it would not interfere to accomplish the same object in an indirect manner, and enforce the negative stipulation by means of an injunction; and *a fortiori* would not indirectly enforce the positive stipulations by enjoining their breach when there were no negative stipulations.(3) This doctrine, however, was subject to certain limitations, especially when the contract grew out of or involved the relation of partnership between the parties, or the parties stood to each other, in respect to the matters contracted for, as partners, the court would negatively enforce it by restraining a breach, although it could not compel affirmatively the performance of any stipulation.(4) And the court would not, in pursuance of this doctrine, refuse to restrain a breach of a contract because it contained some stipulation which, it might afterwards appear, could not be affirmatively enforced.(5)

(1) *Johnson v. Shrewsbury, etc., R'y. Co.*, 3 DeG. M. & G. 914, 926; *Pickering v. Bp. of Ely*, 2 Y. & C. C. C. 249; *Stocker v. Brockelbank*, 3 McN. & G. 250; *Horne v. London & N. W. R'y Co.*, 10 W. R. 170; *Brett v. East India, etc., Co.*, 12 W. R. 596; *Mair v. Himalaya Tea Co.*, L. R. 1 Eq. 411; *Chinnock v. Sainsbury*, 30 L. J. (N. S.) Ch. 409; *Palmer v. Scott*, 1 R. & My. 391; *De Rivaflinoli v. Corsetti*, 4 Paige, 264; *Hamblin v. Dinneford*, 2 Edw. Ch. 529; *Sanquirico v. Benedetti*, 1 Barb. 315; *Haight v. Badgeley*, 15 Barb. 501; *Marble Co. v. Ripley*, 10 Wall. 339; *Randall v. Latham*, 36 Conn. 48 (an agreement to construct a spout in a water-course); *Richmond v. Dubuque, etc., R. R.*, 33 Iowa, 422; *Cooper v. Pena*, 21 Cal. 404, 411; *Ford v. Jermon*, 6 Phila. 6 (contract of an actor).

(2) See *ante*, §§ 24, 25.

(3) An actor agreed to perform at a certain theatre for a certain term, the court would not compel obedience by restraining him from performing at any other place. *Kemble v. Kean*, 6 Sim. 333. And defendant having agreed to furnish drawings for maps to the plaintiffs exclusively, which the plaintiffs were exclusively to sell, as the court could not compel defendant to furnish the drawings, it would not restrain him from selling the maps himself. *Baldwin v. Soc. for Diff. of Useful Knowledge*, 9 Sim. 393. And see *Kimberley v. Jennings*, 6 Sim. 340; *Clarke v. Price*, 2 J. Wils. 157.

(4) *Morris v. Coleman*, 18 Ves. 437; 6 Sim. 335; *Kemble v. Kean*, 6 Sim. 333; *De Rivaflinoli v. Corsetti*, 4 Paige, 264.

(5) *Whittaker v. Howe*, 3 Beav. 383, 395.

SEC. 311. The doctrine has, however, been completely overthrown or abandoned in the English courts. As stated in a former section(1), it was first held that when the agreement for purely personal services contains positive and negative clauses, and a specific performance of the former cannot be affirmatively decreed, the court will still restrain a breach of the latter, although a specific execution of the whole contract is thus indirectly secured.(2) This new rule was soon carried further, and it was held that the breach of a contract for personal services would be enjoined, although it contains no express negative stipulations.(3) If the stipulations which cannot be specifically enforced are wholly on the part of the plaintiff, they would present no obstacle to an injunction restraining the defendant from violating the contract on his part; the plaintiff's performance of his own stipulations would be indirectly compelled by the injunction, since his failure would at once cause a dissolution of the injunction.(4)

SEC. 312. 4. *Contracts whose performance would be continuous.*—Finally, contracts which by their terms stipulate for a succession of acts, whose performance cannot be consummated by one transaction, but will be continuous, and require protracted supervision and direction, with the exercise of special knowledge, skill or judgment in such oversight—such as agreements to repair or to build, to construct works, to build or carry on railways, mines, quarries, and other analogous undertakings—are not, as a general rule, specifically enforced.(5)

(1) *Ante*, §§ 24, 25.

(2) *Lumley v. Wagner*, 1 DeG. M. & G. 604. And see *Dietricksen v. Cabburn*, 2 Ph. 52; *Great Northern Ry. Co. v. Manchester, etc., Ry. Co.*, 5 DeG. & Sm. 138; *Hills v. Croll*, 1 DeG. M. & G. 627, n.; 2 Phil. 60.

(3) *Webster v. Dillon*, 3 Jur. (N. S.) 432.

(4) *Stocker v. Wedderburn*, 3 K. & J. 393, 405.

(5) *Errington v. Aynsley*, 2 Bro. C. C. 343; 2 Dick. 692; *Lucas v. Commerford*, 3 Bro. C. C. 166; *Mosely v. Virgin*, 3 Ves. 184; *Flint v. Brandon*, 8 Ves. 159; *Paxton v. Newton*, 2 Sm. & Gif. 437; *South Wales Ry. Co. v. Wythes*, 1 K. & J. 186; 5 DeG. M. & G. 880; *Booth v. Pollard*, 4 Y. & C. Ex. 61; *Pollard v. Clayton*, 1 K. & J. 462; *Garrett v. Banstead, etc., Ry. Co.*, 4 DeG. J. & S. 462, 465, 467; *Munro v. Wivenhoe, etc., Ry. Co.*, 4 DeG. J. & S. 729, 732, per KNIGHT BRUCE, L. J.; *Gervais v. Edwards*, 2 Dru. & W. 80; *Counter v. Macpherson*, 5 Moo. P. C. 83; *Ford v. Stuart*, 15 Beav. 493; *Peto v. Brighton, etc., Ry. Co.*, 1 H. & M. 468; *Heathcote v. North Staffordshire Ry. Co.*, 20 L. J. (N. S.) 82; *Hamilton v. Dunsford*, 6 Ir. Ch. Rep. 412; *Morrison v. Barrow*, 1 DeG. F. & J. 633; *Powell Duffryn Steam Coal Co. v. Taff Vale Ry. Co.*, L. R. 9 Ch. 331; *Blackett v. Bates*, L. R. 1 Ch. 117, reversing 2 H. & M. 270; *Fothergill v. Rowland*, L. R. 17 Eq. 132; *DeMattos v. Gibson*, 4 DeG. & J. 276, 297, per Ld. CHELMSFORD; *Mann v. Stephens*, 15 Sim 379; *Bernard v. Meara*, 12 Ir. Ch. 389; *Armstrong v. Courteney*, 15 Ir. Ch. 138; *Merchants' Trading Co. v. Banner*, L. R. 12 Eq. 18; *Wheatley v. Westminster Brymbo Coal Co.*, L. R. 9 Eq. 538; *Marble Co. v. Ripley*, 10 Wall. 340; *Port Clinton R. R. v. Cleve-*

## CHAPTER III.

ACTS OR OMISSIONS OF THE PARTIES, AND OTHER FACTS DONE OR OCCURRING SUBSEQUENTLY TO THE CONCLUSION OF THE CONTRACT, WHICH AFFECT THE RIGHT TO A SPECIFIC PERFORMANCE.

SECTION 313. In the first chapter I discussed the nature of the remedy, the extent of the equitable jurisdiction in awarding it, the grounds upon which it rests, and the occasions which admit of its employment. In the second chapter I described the nature and kinds of contracts to which the remedy can be applied, and the various features and incidents of such contracts, which are the necessary prerequisites to their specific enforcement. In the present chapter it is assumed that the contract falls within the equitable jurisdiction; that, on being concluded, it possesses all the features, elements, and incidents belonging to itself, which are essential to its specific execution; and I purpose to inquire what acts or defaults of the parties, and what facts or events independent of the parties, done or happening subsequent to the time of its conclusion, will affect the right to its specific performance—that is, what subsequent acts of the parties are essential to a decree granting the relief, and what subsequent acts, omissions, or events will wholly or partially defeat the remedy. The discussions of this chapter, however, will be confined to matters directly connected with the agreement itself and its subject-matter, including the performance, by either party, of the provisions to be performed on his part, as a condition to obtaining relief against the other; the element

land & Toledo R. R., 13 Ohio St. 544; *Fallon v. R. R. Co.*, 1 Dillon, 121; *Ross v. Union Pacific R. R.*, 1 Woolw. 26; *Green v. Smith*, 1 Atk. 573; *Waring v. Manchester, etc., Ry. Co.*, 7 Ha. 492. As examples, contracts for erecting or repairing buildings, *Beck v. Allison*, 56 N. Y. 367; *Mastin v. Halley*, 61 Mo. 196; a contract to cultivate, cut, cure and deliver a certain crop in a prescribed manner, *Starnes v. Newsom*, 1 Tenn. Ch. 239; a contract to construct a spout in a water-course, *Randall v. Latham*, 36 Conn. 48. But in *Columbia Water, etc., Co. v. Columbia*, 5 S. C. 235, a contract between the company and the city by which the former were to construct certain extensive water-works for the city, was specifically enforced against the city by compelling it to accept them, etc., after the works had been constructed by the plaintiff. The doctrine of the text was also applied in the cases of a contract to transport all of the plaintiff's freight, *Atlanta, etc., R. R. v. Speer*, 32 Geo. 550; an agreement to construct a fence, *Cincinnati, etc., R. R. v. Washburn*, 25 Ind. 259; an agreement to keep cattle-guards in repair, *Columbus, etc., R. R. v. Watson*, 26 Ind. 50.

of time, in connection with such performance—that is, how far a delay, by either party, will modify or defeat an enforcement; the defect in the subject-matter or in the title; the failure of the consideration; the partial execution, with or without compensation, and other similar topics. The various matters which are directly connected with the suit itself, the parties, pleadings, and proceedings in the conduct of the action, are reserved for another and final chapter.

SEC. 314. Before proceeding with the discussion thus outlined, it will be well to state a most important principle of equity, which is not confined, it is true, to the subject of specific performance, but upon which, as a foundation, are based a large part of the doctrines and rules governing the mutual relations of the two parties, and defining the conditions essential to the remedy of specific performance. This principle, to which I refer, is the equitable theory of the interest and estate in the land, both of the vendor and the vendee, under and by virtue of a contract for the sale of land. In law, a contract for the sale of land is wholly, in every particular, executory, and produces no effect upon the respective estates and titles of the parties. The vendor remains *to all intents* the owner of the land; he can convey it free from any *legal* claim or incumbrance; he can devise it; on his death, intestate, it descends to his heirs; the contract in no manner interferes with his legal right to, and estate in the land; and he is simply subjected to the *legal* duty of performing the contract, or paying such damages as a jury should award. On the other hand, the vendee acquires no interest whatever in the land; his right is a mere thing in action; and his duty is a debt—an obligation—to pay the price; and on his death both this right and this duty pass to his personal representatives, and not to his heirs; in short, he obtains at law no real property or interest in real property; the relations between the two parties are wholly *personal*. No change is made until, by the execution and delivery of a deed of conveyance, the estate in the land passes to the vendee. Equity views all these relations from a very different stand-point. In some respects, for some purposes, the contract is executory in equity as well as at law; but so far as the interest or estate in the land of the two parties is concerned, it is regarded as executed, and as operating to transfer the estate from the vendor and to vest it in the vendee. This theory must of necessity make a great difference in the respective rights, duties, and relations of the vendor and vendee. One of the grand principles of equity—one of the great foundation-stones upon which the whole superstructure of particular doctrines and rules is erected—is the proposition: Equity regards and

treats as done what, in good conscience, ought to be done. This principle, so brief in its statement, is most broad in its application, and fruitful in its results; from it, as the root, spring a large part of the rules which make up the body of equitable jurisprudence. Apply the principle to the present case. By the terms of the contract, the land ought to be conveyed to the vendee, and the purchase-money ought to be transferred to the vendor; equity, therefore, regards these as done—the vendee as having acquired the property in the land, and the vendor as having acquired the property in the price. The vendee is looked upon and treated as owner of the land; an equitable estate has vested in him commensurate with that provided for by the contract, whether in fee, for life, or for years; although the vendor remains owner of the legal estate, he holds it as a trustee for the vendee, to whom all the beneficial interest has passed. The consequences of this doctrine are all followed out. As the vendee has acquired the full equitable estate—although still wanting the confirmation for purposes of security against third persons of the legal title—he may convey or incumber it; may devise it by will; on his death, intestate, it descends to his heirs, and not to his administrators; in this country, his wife is entitled to dower in it; a specific performance, after his death, is enforced by his heirs; in short, all the incidents of an ownership belong to it. As the vendor's legal estate is held by him on a naked trust for the vendee, this trust impressed upon the land, follows it in the hands of other persons who may succeed to his legal title—his heirs, and grantees who take with notice of the vendor's equitable right. In other words, the vendee's equitable estate avails against the vendor's heirs, devisees and grantees with notice; it is only when the vendor has conveyed the land to third persons, who are *bona fide* purchasers for value, without notice, that other equitable principles come into play, and cut off the vendee's equitable title. It follows, also, as a necessary consequence, that the vendee is entitled to any improvement or increment in the value of the land after the conclusion of the contract, and must himself bear any and all accidental injuries, losses, or wrongs done to the soil by the operations of nature, or by tortious third persons, not acting under the vendor; and, as a general rule, the vendee is entitled to the rents, profits, and products of the land accruing after the time when the contract ought to have been completed—a right, however, which does not arise when the delay in completion results from his own acts or defaults. The equitable interest of the vendor is correlative with that of the vendee; his beneficial interest in the land is gone, and only

the naked legal title remains, which he holds in trust for the vendee. He, however, is regarded as owner of the purchase-price, and the vendee, before actual payment, is simply a trustee of the purchase-money for him. Equity carries out this doctrine to its consequences. Although the land remains in possession and in the legal ownership of the vendor, yet equity, in administering his whole property and assets, looks not upon the land as land—for *that* has gone to the vendee; but looks upon the money which has taken the place of the land—that is, so far as the land is a representative of the vendor's property, so far as it is an element in his total assets, equity treats it as money—as though the exchange had actually been made, and the vendor had received the money and transferred the land. Although the legal title to the land would still descend to the vendor's heirs, still when the vendee completes the contract, takes a conveyance of the legal title *from* the heirs and pays the price, the money being all the time a unit of the vendor's assets, and being, therefore, all the time a part of his personal and not of his real property, goes to his executors or administrators, to be by them administered upon with the rest of the personal assets, and does not go to the heirs. This doctrine—and the present instance is simply one application of it out of many—by which, from a contract of sale, the land bargained to be sold and conveyed, while remaining in the vendor's hands as yet unconveyed, is treated by equity as personal property, as a mere representative of the money which has been promised in consideration of its conveyance, is called the doctrine of equitable conversion; and it is a necessary consequence of the more fundamental principle, that by virtue of the contract the vendee acquires the full equitable estate in the land, the vendor holding it as trustee for him; while the vendor, in turn, acquires the equitable property in the price, the vendee being a trustee for him in respect of such purchase-price. Instead of citing authorities in support of each one of the particular rules stated in the foregoing resumé of the equitable doctrine, I have collected authorities which support the principle with its various results into one note.(1) With such an effect given to the

(1) *Champion v. Brown*, 6 Johns. Ch. 403; *Seaman v. Van Rensselaer*, 10 Barb. 86; *Worrall v. Munn*, 38 N. Y. 139; *Huffman v. Hummer*, 2 C. E. Green, 263; *Brewer v. Herbert*, 30 Md. 301; *Wood v. Cone*, 7 Paige, 472; *Wood v. Keyes*, 8 Paige, 365; *Lindsay v. Pleasants*, 4 Ired. Eq. 321; *Pratt v. Taliaferro*, 3 Leigh, 419; *Craig v. Leslie*, 3 Wheat. 553, 577, 578; *Taylor v. Benham*, 5 How. (U. S.) 234; *Yates v. Compton*, 2 P. Wms. 308; *Trelawney v. Booth*, 2 Atk. 307; *Rose v. Cunynghame*, 11 Ves. 554; *Kirkman v. Miles*, 13 Ves. 338; *Green v. Smith*, 1 Atk. 572, 573; *Pollexfen v. Moore*, 3 Atk. 273; *Mackreth v. Symmons*, 15 Ves.

contract for the sale of lands, it was inevitable that the particular rules of equity concerning the carrying out and enforcement of the contract should be widely different from those which prevail at law.

SEC. 315. If a contract of sale vests the beneficial estate in the purchaser, and renders the purchase-money a fund already under the equitable ownership of the vendor, it is natural and indeed inevitable, that a strict performance of the terms of the contract by the plaintiff is not always requisite as a condition precedent to his obtaining the equitable remedy of a specific performance. Herein lies the distinction between the legal and the equitable rules concerning the judicial enforcement of agreements which are *in form* of the same kind, but which are, nevertheless, by virtue of the peculiar doctrines of equity, substantially of different classes. This distinction may be briefly summed up as follows: Where a contract for sale is strictly executory,

329, 336; *Walker v. Preswick*, 2 Ves. 622; *Trimmer v. Bayne*, 9 Ves. 209; *Pulteney v. Darlington*, 1 Bro. C. C. 237; *Burgess v. Wheate*, 1 Elen, 181, 194, 195; *Beverly v. Peters*, 10 Pet. 532, 533; *Kerr v. Day*, 2 Harris, 112, per BELL, J. (see op. quoted *ante*); *Haugwout v. Murphy*, 7 C. E. Green, 119; 8 id. 531: "In equity, upon an agreement for the sale of lands, the contract is regarded, for most purposes, as if specifically executed. The purchaser becomes the equitable owner of the lands, and the vendor of the purchase-money. After the contract the vendor is the trustee of the legal estate for the vendee. *Crawford v. Bertholf*, Saxton, 460; *Hoagland v. Latourette*, 1 Green Ch. 254; *Huffman v. Hummer*, 2 C. E. Green, 264; *King v. Ruckman*, 6 C. E. Green, 539. Before the contract is executed by conveyance, the lands are devisable by the vendee, and descendible to his heirs as real estate; and the personal representatives of the vendor are entitled to the purchase-money. Story Eq. §§ 789, 790, 1212, 1213. If the vendor should again sell the estate of which, by reason of the first contract, he is only seized in trust, he will be considered as selling it for the benefit of the person for whom by the first contract he became trustee, and therefore liable to account (2 Spence Fq. Jur. 310); or the second purchaser, if he had notice at the time of his purchase of the previous contract, will be compelled to convey the property to the first purchaser. *Hoagland v. Latourette*, 1 Green Ch. 254; *Downing v. Risley*, 2 McCarter, 94. A purchaser from a trustee, with notice of the trust, stands in the place of his vendor, and is as much a trustee as he was. 1 Eq. Cas. Abr. 384; *Story v. Lord Windsor*, 2 Atk. 631. The *cestui que trust* may follow the trust property in the hands of the purchaser, or may resort to the purchase-money as a substituted fund. *Murray v. Ballou*, 1 Johns. Ch. 566, 581. It is upon the principle of the transmission by the contract of an actual equitable estate, and the impressing of a trust upon the legal estate for the benefit of the vendee, that the doctrine of the specific performance of contracts for the sale and conveyance of land mainly depends." See, also, *Richter v. Selin*, 8 S. & R. 425, 440; *Robb v. Mann*, 1 Jones, 300; *Siter's Appeal*, 2 Casey, 178; *Phillips v. Sylvester*, L. R. 8 Ch. 173, 176, per Lord SELBORNE; *Greaves v. Gamble*, 1 Pa. Leg. Gaz. Rep. 1; *Lewis v. Smith*, 9 N. Y. 502, 510; *Moyer v. Hinman*, 13 N. Y. 180; *Moore v. Burrows*, 34 Barb. 173; *Adams v. Green*, 34 Barb. 176; *Schröppel v. Hopper*, 40 Barb. 425; *Thomson v. Smith*, 63 N. Y. 301, 303.

so that no property, estate, or interest in its subject-matter passes thereby to the purchaser—and cannot pass except by a performance—it is an inflexible rule of the law that the plaintiff cannot maintain an action for the purpose of enforcing it directly or indirectly by recovering damages for its non-performance, unless he performed, or tendered performance of everything on his part to be done in pursuance of the literal terms of the agreement, at the very time and in the exact manner provided for by those terms; and an omission to do so by the plaintiff is not excused or its effect obviated by showing that it was not due to his own laches, neglect, or other default, or that it was not injurious to the defendant.(1) This doctrine, when applied to such contracts, viz., those purely executory—which do not operate to create or transfer any equitable estate or interest—prevails in equity as well as at law, although its operation is, from the effect of equitable principles, much more limited and confined to fewer instances in equity than at the law.(2)

Conversely, whenever the contract is an executed one, when it operates as a true sale and transfers the property in the subject-matter to the buyer; then, even at law, its binding force is not lessened because the vendor has not delivered or offered to deliver, or the buyer does not pay or tender payment at the exact time stipulated. The case of an ordinary sale of goods on credit is an example. The property passing to the buyer, his failure to pay the price at the specified time, or even his complete failure to pay, does not avoid the agreement, unless by its express and peculiar provisions the obligation was made to depend upon such payment, so that a failure should operate as a rescission.(3) Now, a contract for the sale of land, although executory in form, and always executory at law, is, as we have seen, regarded in equity for many purposes—and for all purposes so far as the estates of the parties are concerned—as executed; it passes a property, an estate to the vendee, which equity treats as the beneficial and substantial ownership. It must, therefore, in equity, fall under the second of the above rules, and a delay by the plaintiff, or

(1) *Gath v. Lees*, 3 Hurlst. & Colt. 558; *Hoare v. Rennie*, 5 H. & N. 19; *Coddington v. Paleologo*, L. R. 2 Exch. 193; *Russell v. Nicoll*, 3 Wend. 112; *McCulloch v. Dawson*, 1 Ind. 413; *O'Kane v. Kiser*, 25 Ind. 168; *Hill v. Fisher*, 34 Me. 143; *Shaw v. Wilkins*, 8 Humph. 647, 652; *Marshall v. Powell*, 9 Q. B. 779, 792; *Sansome v. Rhodes*, 6 Bing. N. C. 261; *Palmer v. Temple*, 9 A. & E. 508, 517; *B'k of Columbia v. Hagner*, 1 Pet. 455.

(2) *Tilley v. Thomas*, L. R. 3 Ch. 61, 67, 69; Sugd. on Vendors, ch. 4, § 1.

(3) *Martindale v. Smith*, 1 Q. B. 389; *Wilks v. Smith*, 10 M. & W. 360; *Welch v. Moffat*, 1 Thomp. & C. 575; *Edgar v. Boies*, 11 S. & R. 445, 450; *Roach v. Dickinsons*, 9 Gratt. 156.



his non-fulfillment of its literal terms, does not prevent his enforcement of the agreement, unless such delay or non-fulfillment produces a substantial loss or injury to the other party beyond compensation, or the equitable modes of compensation.(1)

The foregoing principles enter largely into the rules which have been established touching the enforcement of contracts, which have been properly concluded so as to be binding upon the parties. Two classes of facts may possibly arise and affect the remedial right to a specific performance, viz.: 1. Events which happen without any agency of the parties, independent of their will, and beyond their control; and 2. Acts or omissions of one or the other of the parties connected with, or having reference to the contract. These two classes of facts will be considered in the order just given.

(1) *Kerr v. Day*, 2 Harris, 112, 114; *Siter's Appeal*, 2 Casey, 178; *Sutter's Heirs v. Ling*, 1 Casey, 466; *Richter v. Selin*, 8 S. & R. 425, 440; *Robb v. Mann*, 1 Jones, 300; *Russell's Appeal*, 3 Harris, 319; *Bowie v. Berry*, 3 Md. Ch. 359; *Hunter v. Bates*, 25 Ind. 299; *Papin v. Massey*, 27 Mo. 445, 452; *Wright v. Thompson*, 14 Tex. 558. The true doctrine of equity with respect to the enforcement of contracts when the plaintiff has not punctually complied with the stipulations on his part concerning the time of his performance, and the distinction between that doctrine and the rule prevailing at law, were briefly but most admirably stated by Lord CAIRNS, in *Tilley v. Thomas*, L. R. 3 Ch. 61, 67. After giving the meaning and effect of the provision in question (which was a stipulation that the possession of the premises agreed to be sold should be given at a day named), he says: "The legal construction of the contract is such as I have expressed, and the construction is and must be in equity the same as in a court of law. A court of equity will, indeed, relieve against, and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract for completion or for the steps towards completion, *if it can do justice between the parties*, and if (as Lord Justice TURNER said in *Roberts v. Berry*, 3 DeG. M. & G. 284), there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. *This is what is meant, and is all that is meant, when it is said that in equity time is not of the essence of the contract.*" In the same case Sir JOHN ROLT, L. J., said (p. 69), after stating that the construction must be the same in the law and in equity: "The rights and remedies consequent on that construction may be different in the two jurisdictions, but the grammatical meaning of the expression is the same in each. And if this be so, time is part of the contract; and if there is a failure to perform within the time, *the contract is broken in equity no less than at law*. But in equity there may be circumstances which will induce the court to *give relief against the breach*, and sometimes though occasioned by the neglect of the suitor asking the relief. Not so at law. The legal consequences of the breach must there be allowed strictly to follow. The defendant is entitled to say that the contract is at an end; and it is in this sense that, in such cases it is said that time is of the essence of the contract at law, though not necessarily so in equity." And see *Lennon v. Napper*, 2 Sch. & Lef. 682, per Lord REDESDALE; *Roberts v. Berry*, 3 DeG. M. & G. 284, per KNIGHT-BRUCE, L. J.

## SECTION I.

*Events without the agency of the parties ; and herein failure of the subject-matter or of the consideration.*

SECTION 316. Whether a failure or defect or depreciation of the subject-matter, or any other similar extrinsic event, beyond the control of either party—that is, happening without the agency or default of a party—shall affect the right to a specific performance, depends, as a general rule, upon the time when it took place with reference to the conclusion of the contract; or, in other words, upon the fact of its taking place *before* or *after* the contract was finally concluded so that the equitable estate would thereby pass to the vendee. It is necessary, therefore, to determine with precision, in the first place, the exact time when an agreement is regarded in equity as concluded—as so concluded that the equitable ownership of the subject-matter vests in the vendee, and of the purchase-price in the vendor. In determining this point, contracts must be considered with reference to the following classes, into which they may all be separated: 1. those which are private bargains, whether made by ordinary negotiation or by auction sale; 2. those which are public sales, made by order of a court in the course and as a part of some judicial proceeding; and 3. those belonging to either of the former two classes, which are conditional—the obligation of them depending upon the happening of some condition—in opposition to those which are absolute in their terms.

SEC. 317. *Private, absolute sales.*—In case of private contracts for the sale or leasing of land, or of any estate therein, the time of their conclusion, at which the equitable interests of the parties are fixed, is that of signing the agreement, or the note, or memorandum thereof in writing, provided the vendor's or lessor's title is good, although such title is not made out and shown until afterwards. The contract then becomes binding, and the subsequent exhibition of his title by the vendor relates back to the date of the execution.(1) It can make no

(1) *Harford v. Purrier*, 1 Mad. 538, per Sir THOMAS PLUMER: "It is the established doctrine of equity that, if a contract of purchase is to be completed at a given period, and the title is *finally made out*, the parties continuing in treaty, and the purchaser not by any acts released from his bargain, the estate is considered as belonging to the purchaser from the date of the contract, and the money as from that time belonging to the vendor." *Pierce v. Nichols*, 1 Paige, 244; *Baldwin v. Salter*, 8 Paige, 473; 7 Paige, 78; *Seymour v. Delancey*, 3 Cow. 446; *Richter v. Selin*, 8 Serg. & R. 425, 440; *Robb v. Mann*, 1 Jones, 300, per ROGERS, J.

difference whether such sale is the result of an ordinary negotiation, or is made at auction. In the latter case, the contract may be completed by the signing of the memorandum by the auctioneer or his clerk, as the agent of both parties. There are, however, a few older authorities which seem to hold that the time which thus fixes the rights of the parties, is not the date of executing the contract, but that of accepting the title by the purchaser—in other words, that the contract does not become binding and operative, so as to pass the equitable estate, until the title has been thus accepted.(1) This rule is, however, plainly erroneous. Of course, the contract fails—or, to speak more accurately, this contract never was really made—if it turns out that the vendor had no title; but if he has a title, the establishment of this fact, and the acceptance thereof by the vendee, relate back, and the interests of the two parties are fixed as from the date of the instrument.

SEC. 318. *Sales by order of court.*—By the equity practice an interval is allowed after the sale and before it is finally confirmed, during which the bidding may be reopened and a resale directed for various causes. The question is thus presented: Whether the fixing the rights and interests of the parties dates from the sale itself or from the order of confirmation, or whatever other act the practice has substituted in place of such order? The rule which seems to be sustained by the weight of authority, pronounces the rights and estate of the parties to be settled at the date of the sale, subject, of course, to be defeated by an order for opening the bids and reselling the subject-matter; the confirmation thus relates back to that time.(2) According to some authorities, or at least *dicta*, the time at which the equitable interests of the parties are established, and when the purchaser is to be considered as owner of the estate, is the date of the order confirming the

(1) *Wyvill v. Bishop of Exeter*, 1 Price, 292, 295, n.; *Paine v. Meller*, 6 Vesey, 349.

(2) By this rule the sale is the point of division between events before and events after the contract, although the vendee can do nothing with the property until such sale has been confirmed. *Vesey v. Elwood*, 3 Dr. & War. 74, per Lord ST. LEONARDS; *Anson v. Towgood*, 1 J. & W. 637, per Lord ELDON. In *Robb v. Mann*, 1 Jones, 300, the question was directly presented. (See facts and opinion, *ante*.) ROGERS, J., said: "The question is to whom the property belonged in the intermediate time between the sale and its confirmation by the court;" and it was decided that it belonged to the vendee, and that the loss then occurring fell on him, although he had no power to prevent the wrong done—the tortious acts by the trespassers. See, also, *Stoever v. Rice*, 3 Whart. 25; *Bashore v. Whisler*, 3 Watts, 494; *Morrison v. Wurtz*, 7 Watts, 437; *Andrews v. Scotton*, 2 Bland (Md.), 629.

order of sale, or of whatever other judicial act the practice substitutes in place of such order.(1)

SEC. 319. *Conditional contracts.*—The rule is different in the case of a contract conditional in its very nature. The equitable interests or estates of the parties are not fixed at the conclusion of the agreement, but by the happening of the condition which renders the contract absolute. Until the contract is thus changed from a conditional into an absolute one, the estate in the subject-matter does not pass to the vendee, but remains in the vendor, and the subject-matter itself continues to be at his risk.(2)

SEC. 320. As the time when the equitable estate vests in the purchaser is that which fixes the rights of the parties under the contract, all events which affect the subject-matter, and which *may* modify the interests and obligations of the parties, must be referred to this point of time, as occurring either before or after it. Events happening *before* this point of time, which either destroy the subject-matter or materially injure it, which defeat or materially lessen the estate agreed to be transferred, will, as has already been shown, defeat a specific performance, since their real effect is to prevent a valid contract, in its very inception, from being made. If these prior events affect the subject-matter, or the estate to be transferred, but not substantially or materially, they may not, as has been shown in previous sections, constitute a complete defense to a specific enforcement of the contract, but may only furnish ground for a compensation.(3) The general rule has been applied to a contract for the sale of a remainder in fee after an estate tail, where it turned out that the tenant in tail had suffered a recovery, and thus cut off the remainder;(4) and to contracts concerning chattels or personal property which, even at law,

(1) *Robertson v. Skelton*, 12 Beav. 260, 265, per Lord LANGDALE; and see, also, *Paramore v. Greenslade*, 1 Sm. & Gif. 541; *Busey v. Hardin*, 2 B. Monr. 407; *Owen v. Owen*, 5 Humph. 352.

(2) *Counter v. McPherson*, 5 Moo. P. C. C. 83. Owners agreed to lease for five years from April 1, 1840, they stipulating to erect a new warehouse on the ground and to repair the old one before that date, the rent to depend upon the amount thus expended. April 1st arrived and the improvements had not been made, but the intended lessees did not object, but continued to occupy a part of the premises under an old contract. Shortly after all the buildings were destroyed by fire. The owners sued for a specific performance, and it was held by the P. C. that the contract was conditional; the agreement was to sell or lease upon the completion of the buildings, and until they were completed the risk was upon the vendor.

(3) See Section on "Compensation," *post*.

(4) *Hitchcock v. Giddings*, 4 Price, 135.

require that the thing should be in existence at the time the agreement is made, so that if the article or property has ceased to exist, no valid agreement arises.(1)

SEC. 321. This doctrine, as to the effect of a failure in the subject-matter, applies, under some circumstances, to a failure of the consideration, but it is important to observe with accuracy the extent and limits of such application. Whenever the consideration is money, or a promise to pay money, there cannot, by any possibility, be a *failure* of the consideration, in the sense in which the subject-matter *fails*; because, although the money may not be paid according to the stipulation, the *liability* to pay it always remains, and constitutes a consideration. It is true that a purchaser who has not paid, or tendered or offered to pay the price, as stipulated, may not be able to enforce the contract against the vendor, but his inability in such case would not result from any "*failure*" of the consideration, but from his neglect to perform what was to be done on his part as a condition precedent to his obtaining relief against the vendor. It is possible, however, that there should be a true failure of consideration, although even then the failure will be in the "subject-matter" of the agreement, as made by one of the parties. If the consideration of A.'s promise to convey or to do some other act, was a promise by B. to convey land, or a designated estate in land, or certain personal property, and it should turn out that at the time of making the contract the land or the personal property which B. undertook to convey had no existence, or he had no estate in it which he could transfer, then, regarding the agreement as a promise made by A., the consideration would have failed; but regarding it as a promise made by B., the subject-matter would have failed, and in either mode of looking upon it, the failure would prevent B. from obtaining its specific enforcement. To this extent, and no further, a failure of the consideration being identical with a failure of the subject-matter, will prevent the specific execution of a contract, because in reality it prevents the contract from having any valid inception. If such a failure of the consideration, or inability of one party to do the acts which formed the considera-

(1) It is, of course, assumed that the contract purports to operate *in praesenti*, and with reference to an existing chattel or thing in action. The rule does not apply to agreements which purport to operate *in futuro*, and with reference to things not *in esse* but *in posse*—as, for example, an expected crop of grain. In illustration of the rule stated in the text, see *Strickland v. Turner*, 7 Exch. 208 (sale of a life annuity, the person on whose life it depended having died); *Couturier v. Hastie*, 9 Exch. 102; 5 H. L. Cas. 673 (sale of a cargo afloat, which had been lost).

tion for the engagement of the other party, should happen *after* the time at which the agreement was concluded and the interests of the two parties were fixed, and should operate to prevent the party who had thus undertaken to do the acts, from specifically enforcing the contract against the other, the remedy in such a case would be denied, not because the consideration or the subject-matter had failed, but because the one seeking relief had not performed or offered performance, and was not ready to perform what was to be done by him as a condition precedent to his obtaining the equitable remedy.(1)

SEC. 322. The effect of events occurring after the point of time which fixes the interests of the parties is wholly different from that of prior events. At that period, although the contract is executory in form, and is treated as wholly executory at law, the equitable beneficial estate in the subject-matter passes to the purchaser, and he becomes in contemplation of equity the real owner. He, therefore, takes the benefit of all subsequent improvements, increases, gains, rises in value, and other advantages happening to the property. On the other hand, the subject-matter is at his risk, and he must bear all losses, total or partial, from fire or other accidental causes, or from trespassers, and all depreciations in value, and other disadvantages; *res perit domino*. But the latter proposition is subject to a most important modification, viz., that the loss or depreciation does not happen from the neglect, default, or unwarrantable delay of the vendor in carrying out the contract.(2)

(1) See, as illustrations, *Jacox v. Clarke*, Walk. Ch. 508; *Morrill v. Aden*, 19 Vt. 505; *Baker v. Thompson*, 16 Ohio, 504; *Selby v. Hutchinson*, 4 Gilm. 319. For an example of failure of the consideration preventing a specific performance, see *Butman v. Porter*, 100 Mass. 337; and see many cases cited in the two following sections.

(2) As the vendee bears these losses, unless the vendor is responsible for them, it follows that the losses, or the events, change in circumstances, or accidents which cause them, do not avail to prevent the specific enforcement of the contract against him, any more than the gains or events which cause them prevent a specific enforcement against the vendor. The following are examples: Destruction by fire of the houses sold does not enable the vendee to resist a specific performance. *Paine v. Meller*, 6 Ves. 349; and see *Cass v. Rudele*, 2 Vern. 280, and 1 Bro. C. C. 156, n. An agreement to sell in consideration of a life annuity is not prevented from enforcement by the death of the one on whose life the annuity is payable—the annuitant—even before any payment is due. *Mortimer v. Capper*, 1 Bro. C. C. 156; *Jackson v. Lever*, 3 Bro. C. C. 605. Money having been left to be laid out in land, and the land to be settled on A. in tail, with remainder to B. in fee, A. and B. agreed to divide the money between them; but before this agreement was carried out or any division actually made, A. died without issue—a specific performance was enforced against B., although according to the original arrangement B. would have then been entitled to the whole. *Carter v. Carter, Forrest*,

The doctrine is fully supported by the American decisions, that the purchaser must sustain any loss happening to the subject-matter between the date of concluding the agreement and that of the conveyance; and, on the other hand, is entitled to any increase or gain which may arise during the same period.(1) Thus, where a manufactory had been sold at auction by order of the court, and between the sale and the confirmation thereof, the machinery and fixtures were carried off by trespassers, the purchaser was still compelled to specifically perform his agreement.(2) A rise in value of the subject-matter, between the contract and the carrying into effect, resulting from a change in circumstances or discoveries, and the like, enures to the benefit of the purchaser, and is no ground for the vendor's refusing to perform, it being understood, of course, that the agreement was fair in its inception, without any fraud, or any feature which equity calls mistake;(3) nor will a fall in the value, even though sudden and unforeseen, enable the vendee to resist a specific execution at the suit of the vendor.(4) The same rule would apply if the consideration should depreciate in value and become practically worthless subsequent to the conclusion of the contract, either before or after it was actually paid over or transferred to the vendor. This has been illustrated by recent cases growing out of contracts for sale where the payment was made or to be made in confederate notes. In one instance, a contract was made during the war for the sale of land for \$6,000, payment to be made in that currency. The land was worth that amount, and continued unchanged in value. The purchaser was prompt in tendering payment according to the terms of the contract, but the notes were then worth only \$385 of the United States currency. As no delay of the vendee had exposed the vendor to this collapse in the consideration, it was held that the change in the value of

271. A trader agreed to take two persons into partnership for a term of 18 years, and in consideration thereof they agreed to pay him a certain sum in installments; before all the installments were paid he became a bankrupt, and, of course, the partnership was dissolved; but his assignees were held entitled to enforce payment of the remaining installments. *Akhurst v. Jackson*, 1 Sw. 85, and see *Coles v. Trecothick*, 9 Ves. 246, per Lord ELDON.

(1) *Richter v. Selin*, 8 S. & R. 425, 440, per DUNCAN, J.; *Greaves v. Gamble*, 1 Pa. Leg. Gaz. Rep. 1.

(2) *Robb v. Mann*, 1 Jones, 300.

(3) *Lee v. Kirby*, 104 Mass. 420, 428; *Ewing v. Beauchamp*, 6 B. Mon. 422; *Andrews v. Bell*, 6 P. F. Smith, 343; *Willard v. Tayloe*, 8 Wall. 558, 571, per FIELD, J.

(4) *Marble Co. v. Ripley*, 10 Wall. 337; *Cooper v. Pena*, 21 Cal. 403; *Andrews v. Bell*, 6 P. F. Smith, 343, 350.

the consideration constituted no defense to an enforcement against the vendor ;(1) and in similar contracts, payments having been made and accepted of confederate notes during the war, the vendors were compelled to perform by conveying after the war, although the notes had become absolutely worthless.(2) But both of these rules must be taken with an important limitation, as follows : If the loss, or depreciation in value, occurs during a delay in carrying the contract into effect, which is caused by the vendor's own laches, default, inability to make title, and the like, then the purchaser does not bear such loss or depreciation, but is excused from performance.(3) Also, if the depreciation or extinction of the consideration occurs during a period of waiting, caused by the vendee's delay or neglect or inability to comply with the stipulations on his part, then such loss does not fall upon the vendor, but constitutes a sufficient defense to a specific performance against him.(4) In pursuance of the general doctrine, if the subject-matter is destroyed by fire, after the time when the contract by its conclusion fixes the rights of the parties, the purchaser is still liable to a specific performance, unless, as last above stated, the casualty occurred during the period of the vendor's laches and delays, or was the result of his default.(5)

In some early cases the doctrine under discussion was not acted upon, and the failure of the subject-matter or of the consideration was treated as a sufficient ground for refusing a decree of specific perform-

(1) *Hale v. Wilkinson*, 21 Gratt. 75, per MONCURE, J. : "We must carry ourselves back to the date of the contract. If at that time the consideration would have been deemed adequate, if the court would then have decreed a specific execution of the contract, the conclusion is inevitable that the consideration must now be deemed adequate, and the court must now decree such execution."

(2) *Ambrouse v. Keller*, 22 Gratt. 769 ; and see *Booten v. Scheffer*, 21 Gratt. 474, 494.

(3) *Wyvill v. Bp. of Exeter*, 1 Price, 294 ; *Paine v. Meller*, 6 Ves. 349 ; *Christian v. Cabell*, 22 Gratt. 82. In the last case the vendor was delayed in completing by the difficulty in removing an incumbrance, the amount of which was in dispute, and in the meantime the buildings were burned up, and the vendee was held to be freed from the obligation of a specific performance. In *Griffin v. Cunningham*, 19 Gratt. 571, the vendor was delayed in making title to about one-sixth of the land by the loss of a deed, which was not found until a long time had elapsed, and in the meantime the property greatly depreciated in value, and this was held to discharge the vendee.

(4) In *Booten v. Scheffer*, 21 Gratt. 474, the vendee delayed completing on his part until the notes which he had agreed to give as payment were greatly depreciated, and a specific performance was refused against the vendor ; and see, also, *Merritt v. Brown*, 4 C. E. Green, 286 ; *Westerman v. Means*, 2 Jones, 97 ; *Kirby v. Harrison*, 2 Ohio St. 326.

(5) *Brewer v. Herbert*, 30 Md. 301. See *Gates v. Green*, 4 Paige, 355.



ance. These cases, although decided by judges of high authority, do not represent the equitable rules on the subject which have since been established by an unbroken course of adjudication.(1)

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## SECTION II.

*Performance by the plaintiff a condition precedent to his enforcing performance upon the defendant.*

SECTION 323. It is the fundamental doctrine upon which the specific enforcement of contracts in equity depends, that either of the parties seeking to obtain the equitable remedy against the other must, as a condition precedent to the existence of his remedial right, show that he has done or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to its terms. In the language of many cases, the plaintiff must show himself "ready, willing, desirous, prompt, and eager." There are, it is true, two *apparent* exceptions to, but in reality only modifications of this rule, which will be discussed at large in subsequent sections, namely, 1, that a strict performance at the very time stipulated is not generally essential; and 2, partial, immaterial defects of the subject-matter or failures of title, when admitting of compensation, may not prevent the vendor, plaintiff, from enforcing the remaining part of the agreement. Even in these instances, there is no real departure from the rule; where a delay is permitted, it does not render a performance some time at or before the suit, any the less necessary; and the defects or failures in the subject-matter or title of the vendor must be so partial, immaterial, and formal, that the substance of the contract, and all its really essential terms, can be and are carried into effect by the plaintiff.

(1) *Davy v. Barber*, 2 Atk. 489, per Lord HARDWICKE; *Stent v. Bailis*, 2 P. Wms. 217; *Pope v. Roots*, 1 Bro. P. C. 370. For cases involving a peculiar condition of circumstances which have sometimes arisen in England, where the performance of an agreement to give a lease for years was possible at the commencement of the suit, but became impossible, so as to confer any interest on the plaintiff, by the mere efflux of time before the suit was terminated by a decree. See *Nesbit v. Meyer*, 1 Sw. 223; *Walters v. Northern Coal Mining Co.*, 5 DeG. M. & G. 629, 639; *Hoyle v. Livesey*, 1 Meriv. 381; *Wilkinson v. Torkington*, 2 Y. & C. Ex. 726, 728; *Kenney v. Wexham*, 6 Mad. 355.

The general doctrine, therefore, remains true, that the party who, as *actor*, calls upon a court of equity for its specific relief, must show that he has complied, or has offered to comply, or is then ready and willing to comply with the provisions of the agreement in respect to what ought to have been done by him, and that he is ready and willing to comply with the provisions in respect to what he will be required to do in the future.(1) In accordance with this doctrine, it is a familiar rule, that the vendor, as plaintiff, cannot enforce a specific performance upon the purchaser, unless he is able to give a good title to the subject-matter which he has contracted to convey.(2) In the treatment of this general doctrine, I shall consider, 1, the plaintiff's duty to comply with all the terms of the contract upon his own part, as a prerequisite or condition to his obtaining equitable relief; and shall add, 2, some remarks concerning the interpretation of provisions which frequently occur in such agreements, when the obligation of the parties may depend upon the interpretation.

SEC. 324. *First. The plaintiff's duty to comply with the provisions on his part. I. The general doctrine applicable to either party when plaintiff.*—A contract may contain provisions requiring acts to be done by the plaintiff at or before the time when he institutes the suit, acts which are the conditions precedent to any remedial right arising in

(1) *Lloyd v. Collett*, 4 Bro. C. C. 463; 4 Ves. 600, n.; *Harrington v. Wheeler*, 4 Ves. 686; *Guest v. Homfray*, 5 Ves. 818; *Alley v. Deschamps*, 13 Ves. 225; *Walker v. Jeffreys*, 1 Hare, 352; *Southcomb v. Bishop of Exeter*, 6 Hare, 213, 218; *Dorin v. Harvey*, 15 Sim. 49; *Alloway v. Braine*, 26 Beav. 575; *Sharp v. Wright*, 28 Beav. 150; *McMurray v. Spicer*, L. R. 5 Eq. 527, 537; *Earl of Darnley v. London, etc., Ry. Co.*, 3 DeG. J. & S. 24; *Wood v. Perry*, 1 Barb. 114; *Vail v. Nelson*, 4 Rand. 478; *Secrest v. McKenna*, 1 Strob. Eq. 356; *Tyler v. McCardle*, 9 S. & M. 230; *Stewart v. Raymond* R. R. 7 S. & M. 568; *Richardson v. Linney*, 7 B. Mon. 571; *Colson v. Thompson*, 2 Wheat. 336; *Watts v. Waddle*, 6 Pet. 389; *Boone v. Mo. Iron Co.*, 17 How. (U. S.) 340; *McNeil v. Magee*, 5 Mason, 244; *Longworth v. Taylor*, 1 McLean, 395; *Sullings v. Sullings*, 9 Allen, 234; *Earl v. Halsey*, 1 McCarter, 332; *Thorp v. Pettit*, 1 C. E. Green, 483; *Buchanan v. Lorman*, 3 Gill. 77; *Breckenridge v. Clinckinbeard*, 2 Littell, 127; *McCulloch v. Dawson*, 1 Ind. 413; *O'Kane v. Kiser*, 25 Ind., 163; *Brown v. Hayes*, 33 Geo. (Supp.) 136; *Crane v. Decamp*, 6 C. E. Green, 414; *Walker v. Hill*, *ib.* 191; *Merritt v. Brown*, *ib.* 401; *Rogers v. Taylor*, 40 Iowa, 193; *Burling v. King*, 66 Barb. 633; *Blackmer v. Phillips*, 67 N. C. 340; *Long v. Hartwell*, 34 N. J. L. 116; *Allen v. Atkinson*, 21 Mich. 351; *King v. Ruckman*, 21 N. J. Eq. 599; *Van Campen v. Knight*, 63 Barb. 295; *Reeves v. Kimball*, 40 N. Y. 290; *McComas v. Easley*, 21 Gratt. 23.

(2) *King v. Knapp*, 59 N. Y. 462; *Hoover v. Calhoun*, 16 Gratt. 109; *Jackson v. Ligon*, 3 Leigh, 161; *McKean v. Reed*, 6 Littell, 395; *Bryan v. Read*, 1 Dev. & Bat. Ch. 78; *Reed v. Noe*, 9 Yerg. 283; *Cunningham v. Sharp*, 11 Humph. 116, 121; *Buchanan v. Alwell*, 8 Humph. 516; *Hepburn v. Auld*, 5 Cranch, 262.

his favor; as, for example, the vendor's making a good title before he can force the purchaser to accept a conveyance, and the vendee's payment or tender of the price before he can compel a conveyance. There may also be other promissory provisions of the contract which speak of acts *to be done* by the plaintiff *after* the commencement of the suit, and, as is usually the case, in the process of, or as a part of, the final specific execution of the agreement; as, for example, in a contract to give a lease, there may be stipulations describing the covenants to be inserted in the instrument. The former class of provisions, which are by far the most frequent and important, will be first examined.

SEC. 325. In appreciating the force of the general doctrine stated at the commencement of this section, it must be constantly remembered that equity looks to and insists upon a *substantial* as contrasted with a *literal* performance, and to that end discriminates between the terms of a contract which embody its substance, which are essential or material, and which must be performed by the plaintiff, and those which are non-essential, immaterial, formal, the non-performance of which by the plaintiff does not prevent him from enforcing the obligation of the other party, although it may render him liable to make compensation for the default as an incident of the relief which he obtains. As has been shown in Chapter I, a plaintiff may sometimes be able to enforce the specific performance of his agreement in equity, when and indeed because he cannot maintain an action upon it at law by reason of his failure or inability to make a literal, exact compliance with all the terms upon his own part. From this equitable theory of a substantial performance are derived all the subordinate and special rules which permit a vendor to perfect his title after the time for completion; which admit of delay in closing the stipulated acts; and which even allow absolute failures in collateral, immaterial matters when they can be remedied by compensation.(1) Whenever,

(1) Lord *v. Stephens*, 1 Y. & C. Exch. 222, is an example of the equitable notion of a substantial compliance being sufficient. A vendor contracted to sell land, and also in the same contract he agreed to be tenant from year to year of the vendee in respect of the same land. This latter stipulation the vendor was prevented, by his pecuniary necessities, from fulfilling. On his suit to enforce a specific performance against the vendee, it was held that as this stipulation did not go to the substance of the bargain, and as the tenancy itself was so precarious, subject to be ended by a notice from either party, the breach of it was, therefore, immaterial, and should not defeat a specific enforcement by the vendor. See, also, *Davis v. Hone*, 2 Sch. & Lef. 347, per Lord REDESDALE: "A court of equity frequently decrees specific performance when the action at law has been lost by the default of the very party seeking the specific performance, if it be, notwithstanding, conscientious that the agreement should be performed, as in cases

therefore, the whole agreement made between the parties at the same time and concerning the same subject-matter is divisible, and contains in addition to the main part of the contract a separate, incidental or collateral stipulation, the non-performance of such separable collateral provision by the plaintiff, will not hinder him from specifically enforcing the other and essential portion, provided, always, that the main fact is not, by the terms of the whole contract, necessarily dependent upon the minor stipulation, in a manner analogous to covenants or promises mutually dependent. We have seen in the preceding chapter, Section XVII, that where the contract is separable the inability of the defendant to perform the whole may not prevent the plaintiff from compelling an execution of the part which is within the defendant's capacity; the same rule applies to the case of the plaintiff who is unable to perform a separate, independent, collateral and incidental part of his agreement, and is still permitted to enforce against the defendant the specific performance of *his* obligation.<sup>(1)</sup>

SEC. 326. Although the plaintiff must in general show an actual performance on his own part, or else a tender or offer of performance, yet such tender or offer is sometimes unnecessary, and a readiness and willingness to perform is sufficient. The necessity of a tender is obviated, and the readiness and willingness supply its place, when-

where the terms of the agreement have not been strictly performed on the part of the person seeking specific performance; and to sustain an action at law performance must be averred according to the very terms of the contract. Nothing but specific execution of the contract, so far as it can be executed, will do justice in such a case." *Lennon v. Napper*, 2 Sch. & Lef. 684; *Parkin v. Thorold*, 2 Sim. (N. S.) 6, 8; *Roberts v. Berry*, 3 DeG. M. & G. 234, 289; *Oxford v. Provand*, L. R. 2 P. C. 135; *Ogden v. Fossick*, 4 DeG. F. & J. 42; *Gervais v. Edwards*, 2 Dr. & War. 80; *Stocker v. Wedderburn*, 3 K. & J. 393.

(1) *Gibson v. Goldsmid*, 5 DeG. M. & G. 757; reversing S. C., 18 Beav. 584; *Green v. Low*, 22 Beav. 625. In the latter of these cases the owner of land agreed with A. that A. should erect a dwelling on the lot, and should keep it insured in a specified company in their joint names, and as soon as the house was finished the owner should give A. a lease, and if A. should not fulfill on his part the agreement for the lease should be void; and it was also provided that A. should have the option of buying the premises in fee within two years. A. finished the house, insured it in a different company and in his own name, and sued to compel a conveyance under the option. Held, that the stipulation as to leasing was independent of that as to buying, and plaintiff's failure to comply with his agreements concerning the former part of the whole contract could not prevent him from enforcing the latter portion, and so a decree for a specific performance was granted. For further cases of such divisible contracts, see *Wilkinson v. Clements*, L. R. 8 Ch. 96; *Flanagan v. Great Western R'y Co.*, L. R. 7 Eq. 116; *Stewart v. Metcalf*, 68 Ill. 109; *Portland, etc., R. R. v. Grand Trunk R. R.*, 63 Me. 90; *McComas v. Easley*, 21 Gratt. 23; *Van Orman v. Merrill*, 27 Iowa, 476.

ever the case shows, either in the allegations or the evidence, that if a tender had been made it would have been refused by the defendant;(1) or shows that the defendant had, by his own acts or omissions, made it impossible for him to accept the plaintiff's offer, and to fulfill his own part of the agreement.(2) Under such circumstances, equity does not require the empty show of a tender. When an executory contract has been made with a deceased ancestor, the infant heir to whom the land devolves subject to the agreement cannot set up his own incapacity to act as an excuse for not performing the stipulations which are binding upon him as successor of the deceased ancestor, where a performance of such stipulations is necessary to protect the party from loss.(3)

SEC. 327. *Impossibility of performance by the plaintiff.*—If for any cause, even arising after the contract is concluded, it becomes wholly impossible for the plaintiff to perform any part of the contract on his part, he cannot, as a matter of course, enforce a performance against the defendant. This result, if due to events happening after the agreement was entered into, does not arise from the notion of a *failure of consideration*, since, as has been shown, the equitable ownership is transferred at the time when the contract is concluded, and the property is then at the risk of the equitable owner, but it arises from the fact that the plaintiff is unable to do any of the matters and things which were to be done by him as a condition to his calling upon the other party for a performance.(4) If, however, the impossibility extends only to a part of the contract, and that a non-essential, formal part—or, in other words, if the impossibility is merely of a performance according to the exact, literal terms, while a substantial compliance is left within the plaintiff's power—the plaintiff's remedy is

(1) *Hunter v. Daniel*, 4 Hare, 420; and see the following cases at law: *Seaward v. Willock*, 5 East, 202; *Poole v. Hill*, 6 M. & W. 835; *Wilnot v. Wilkinson*, 6 B. & C. 506; *Lovelock v. Franklyn*, 8 Q. B. 371; *Doogood v. Rose*, 9 C. B. 131.

(2) *Hotham v. East India Co.*, 1 T. R. 638; *Stewart v. Raymond R. R.*, 7 S. & M. 568; *Tyler v. McCardle*, 9 S. & M. 230; *Kerby v. Harrison*, 2 Ohio St. 326.

(3) *Griffin v. Griffin*, 1 Sch. & Lef. 352

(4) When a vendor has made a contract to convey a tract of land on which are buildings, the accidental destruction of the buildings by fire, for example, does not hinder him from enforcing a performance upon the purchaser, since he can still convey the land, and the property was, from the date of the contract, at the purchaser's risk, *res perit domino*. But if it could be conceived that not only the buildings but the very land itself should be destroyed, then the vendor could not enforce a performance, since he would be unable to convey anything—that is, would be unable to comply with his own part of the agreement to any extent. Virtually, the case is the same when the vendor's title to the subject-matter wholly fails.

not thereby necessarily defeated. When the default will admit of a compensation, and the contract which the parties have actually made can be carried into effect according to its substantial, essential provisions, without the virtual substitution of another in its stead, the plaintiff may obtain a decree of specific performance with or without compensation, as the equity of the case demands.(1) There is still a third case. If the contract is divisible, the parts not being so mutually dependent that the performance of one is a necessary prerequisite to the performance of the other, and the plaintiff performs one of these parts, and the other part becomes impossible without his fault from causes not under his control, then if by such partial performance he is left in *statu quo*, he is not entitled to a specific enforcement of the agreement against the defendant; but if, on the other hand, by means of such partial performance the plaintiff is *not* left in *statu quo*—or, in other words, if he has thereby so changed his former condition that he cannot be restored to it again—he is entitled to a specific execution of the contract by the other party, and equity will grant him that relief.(2)

SEC. 328. *Exception in relation to the performance of marriage contracts.*—Marriage contracts constitute, in some respects, an exception to the general doctrine that a plaintiff seeking a specific enforcement must show a performance of the terms on his own part. These agreements, in their ordinary form, are made for the benefit of two classes of persons, the spouses who are the actual contracting parties, and who receive the immediate but generally temporary benefit, and the issue of the marriage not in being at the time of their conclusion, who receive their ultimate and generally permanent advantage. With respect to the former class—the actual parties—these marriage contracts are governed by the general doctrine which has already been stated. Neither the husband nor the wife, nor any other of the original parties, can enforce a specific performance, unless they have complied with the stipulations on their own part. But with the issue it is otherwise. They are intended to be benefited by the settlement;

(1) *Counter v. Macpherson*, 5 Moo. P. C. C. 83, 108, and see, *post*, the section on "Compensation."

(2) The rule making this distinction between the plaintiff's changing or not changing his former legal condition by means of his own partial performance, and the effect of such a change upon his right to the equitable remedy, is laid down by Ch. Baron GILBERT in his "*Lex Prætoria*," pp. 240, 242, and has been approved by subsequent authorities. See *Story Eq. Jur.* § 772; *Breckenridge v. Clinkinbeard*, 2 Litt. 127; *Hays v. Hall*, 4 Porter, 374; *McCorkle v. Brown*, 9 S. & Mar. 167.

and, in fact, are usually the persons to whom the property is finally and absolutely given. They have no power nor capacity with respect to carrying into effect the terms of the agreement; and while they are thus the ultimate beneficiaries, and are unable to perform the provisions, it would be wholly inequitable if their rights could be cut off by the omissions or defaults of other persons over whose acts they have no control. It is, therefore, well settled, that while the immediate parties must show a performance on their own part as a condition precedent to an enforcement of a marriage contract against others, the issue may compel a specific execution of the agreement in their own favor, although the persons who were their predecessors, and the actual contracting parties, have not complied with the terms on their own part—have not fully done what by those terms, they were bound to do.<sup>(1)</sup>

SEC. 329. This special rule concerning marriage settlements is, of course, of far more practical importance in England, where they are the almost universal incidents of marriage among persons possessing property, than in the United States, where, although not absolutely unknown, they are comparatively very infrequent. I shall, therefore, not dwell upon the subject, but merely state, in the briefest manner, the restrictions and limitations upon the rule which have been established by the English decisions. 1. The provisions of a marriage contract may be so drawn as to take it out of the rule by expressly requiring performance on the part of the plaintiff, even when the enforcement is asked by the children. If such an intention is suffi-

(1) *Lloyd v. Lloyd*, 2 Myl. & Cr. 204, per Lord COTTENHAM; *Harvey v. Ashley*, 3 Atk. 611, per Lord HARDWICKE. "There is a difference between agreements on marriage being carried into execution and other agreements; for all agreements besides are considered as entire, and if either of the parties fail in performance of the agreement in part, it cannot be decreed in specie, but must be left to an action at law. In marriage agreements it is otherwise; for though either the relations of the husband or wife should fail in the performance of their part, yet the children may compel a performance. If the mother's father, for instance, hath agreed to give a portion, and the husband's father hath agreed to make a settlement, though the mother's father does not give the portion, yet the children may compel a settlement; for a non-performance on one part shall be no impediment to the children receiving the full benefit of the settlement; so if there be a failure on the part of the father's relatives, it is the same." In *Perkins v. Thornton*, Ambl. 502, the heirs of a husband were compelled to settle a jointure which he had agreed to settle, although the husband had not received the portion which the wife's father had contracted to pay. See, also, *Hancock v. Hancock*, 2 Vern. 605; *North v. Ansell*, 2 P. Wms. 618; *Pyke v. Pyke*, 1 Ves. Sen. 376; *Ramsden v. Hylton*, 2 Ves. Sen. 304; *Campbell v. Ingilby*, 21 Beav. 567; 26 L. J. Ch. 654.

ciently expressed in the instrument, it must, of course, control.(1)  
 2. Neither the contracting party who is in default, nor persons claiming under him as assignees, can compel a specific performance of the agreement.(2) 3. Mere collateral relatives, who are not included within the scope of the marriage contract, cannot compel a performance of it by the husband, whenever, by reason of subsequent events or change of circumstances, the provisions for acts to be done on the part of the wife have not been or cannot be complied with.(3)

SEC. 330. *Future terms.*—The party seeking aid of the court as actor—generally the plaintiff—must not only show that he has complied with the terms, so far as they can and ought to be complied with, at the commencement of the suit; he must also show that he is able, ready, and willing to do those other future acts which the contract stipulates for as a part of its specific performance. These future acts are generally covenants agreed to be inserted in leases, and other deeds of conveyance, which the contract provides for, and the performance of such covenants; for the insertion of covenants in a deed is a very easy matter, but would be a very useless form if the covenantor was wholly unable, through bankruptcy, insolvency, and the like, to perform them.

SEC. 331. It is a general rule that when a specific performance is obtained against trustees, and persons who have contracted in a fiduciary capacity analogous to that of trusteeship, and they are required as a part of the specific execution to enter into covenants, they are not obliged to give covenants which bind themselves personally, but it is sufficient if the property is thereby bound.(4) This may not be the case where trustees are plaintiffs. If, for example,

(1) *Lloyd v. Lloyd*, 2 My. & Cr. 192, 204.

(2) *Mitford v. Mitford*, 9 Ves. 87, 96; *Busevi v. Serra*, 14 Ves. 313; *Corsbie v. Free*, Cr. & Ph. 64, 74, per Lord Chan. COTTENHAM; as, for example, in *Crofton v. Ormsby*, 2 Sch. & Lef. 602, 603, the woman agreed to settle an estate for the benefit of her husband, and the husband in turn agreed to settle for the benefit of the wife; and she failed to fulfill on her part. Lord REDESDALE said: "That might be a case in which the wife should not be allowed to have the benefit of the husband's contracts; but that would not affect the children; they must have the estate."

(3) The distinction is here between the rights of direct issue of the marriage and of mere collaterals, and is illustrated by the cases of *Savill v. Savill*, 2 Coll. C. C. 721, and *Campbell v. Ingilby*, 21 Beav. 579.

(4) *Page v. Broom*, 3 Beav. 36; *Phillips v. Everard*, 5 Sim. 102; *Stephens v. Hotham*, 1 K. & J. 571; *Worley v. Frampton*, 5 Hare, 560; *Onslow v. Lord Londesborough*, 10 Hare, 67; *Copper Mining Co. v. Beach*, 13 Beav. 478; *Hodges v. Blgrave*, 18 Beav. 404; *Hare v. Burges*, 4 K. & J. 45.



a person makes a contract, the execution of which requires covenants on his part, and then becomes a bankrupt, his assignees cannot, as plaintiffs, compel a specific performance by the other party, unless they will personally enter into the covenants stipulated for by the agreement.(1) The effect of bankruptcy of a party upon the contract must depend, in a great measure, upon the legislation of particular countries. In England bankruptcy does not necessarily annul the contract for the sale or lease of lands. The assignees of a bankrupt vendor or lessor may compel performance by personally entering themselves into all the covenants which their principal would have made;(2) and by a recent English statute the vendors or lessors may call upon the assignees of a bankrupt lessee to elect whether they will carry out the contract or regard it as annulled.(3) If a party to a contract commits an act of bankruptcy, so that he is liable to be adjudicated a bankrupt therefor, he cannot, while such liability lasts, enforce the agreement either as vendor or as vendee.(4)

SEC. 332. On the same principle the general insolvency of a party might prevent him as plaintiff from enforcing a contract into which he had entered; it would certainly have this effect if he was required, by the contract, to pay money or to enter into covenants for such payment.(5) Where a contract has been assigned by one of its parties, the insolvency of the assignor would be no ground for refusing a specific performance against the other contracting party, but the insolvency of the assignee might be a defense.(6) If one party should commit a felony, he would be unable, as plaintiff, to enforce the agreement.(7) In England the loss or accidental destruction of his title-deeds may prevent a vendor from compelling the purchaser to specifi-

(1) *Ex Parte Sutton*, 2 Rose, 86; *Wittingham v. Joyce*, 3 Ves. 168; *Powell v. Lloyd*, 2 Y. & J. 372; *Weatherall v. Geering*, 12 Ves. 513.

(2) *Brooke v. Hewitt*, 3 Ves. 253, and see cases in last preceding note.

(3) 11 and 12 Vict. Ch. 106, § 146.

(4) Not as vendor, since he cannot give a perfect title to the property—such title may vest in his assignees (*Lowes v. Lush*, 14 Ves. 547)—and not as vendee, because he can't give a good title to the purchase-price; his assignees might recover it back from the vendors. *Franklin v. Lord Brownlow*, 14 Ves. 550.

(5) *Crosbie v. Tooke*, 1 My. & K. 431; *Price v. Assheton*, 1 Y. & C. Exch. 441; for example, an intended lessee could not compel the execution of the lease since his insolvency would prevent him from paying the rent as stipulated for. *Neale v. Mackenzie*, 1 Keen, 474; *Willingham v. Joyce*, 3 Ves. 168; *Buckland v. Hall*, 8 Ves. 92.

(6) *Crosbie v. Tooke*, 1 My. & K. 431.

(7) *Willingham v. Joyce*, 3 Ves. 168.

cally perform a contract of sale, but the reasons for this rule have no existence whatever in the United States.(1)

SEC. 333. *Performance of representations.*—Thus far it has been shown that the plaintiff must, in general, perform, or be ready to perform, all of the *terms* of the contract—all of the stipulations which make a part of the agreement—which provide for acts or omissions by him; but the doctrine goes farther than this, and embraces the promissory representations made by him at or before the time of concluding the contract, and in reliance upon which the defendant entered into the agreement. He must, therefore, perform the terms which constitute the contract itself, and also his representations of matters in the future which induced the other party to assume the obligations.(2) As maps or plans are often used in connection with the sale of land, a question of some practical importance arises as to their effect. When used, referred to, or shown by the vendor at the time of the contract, to how great an extent do they constitute representations by him that the premises are or will be in the condition pictured and described in these papers? If the map or plan is actually incorporated into the contract, or is referred to and identified so as to make it part of the contract, no question can arise; it becomes a term of the agreement to be carried into effect and complied with as much as any other term.(3) On the other hand, if there is no such

(1) *Bryant v. Busk*, 4 Russ. 1. This rule grows out of a practice on the sale and conveyance of land peculiar to Great Britain. The vendor and grantor must show his title; must, therefore, exhibit all the title-deeds; must be prepared to show their execution; and, finally, if the land is conveyed, must deliver up these title-deeds to the grantee; a transfer of the deeds, as muniments of title, is as much a matter of course and almost as important as the execution of a conveyance. It follows that if these title-deeds are not forthcoming, whether through accident or design, the title is not perfected, and the purchaser cannot feel secure in his possession. Our simpler mode of conveyance, and especially our system of universal registry, have removed all of these reasons and grounds on which the English rule rests, and the rule itself cannot prevail in this country.

(2) See *ante*, section on "Misrepresentations," chapter 2, section 12. *Beaumont v. Dukes*, Jac. 422, a vendor had represented that he would make certain improvements about the property, and his failure to do so was held a ground for refusing a specific performance which he asked; and in *Myers v. Watson*, 1 Sim. (N. S.) 523, vendor represented that a church would be erected in the immediate neighborhood of the land—which was sold for building lots—and that he would make certain streets, and non-performance of these promises prevented him from obtaining the relief.

(3) *Nene Valley Drainage, etc., Comm'rs v. Dunkley*, L. R. 4 Ch. D. 1. The commissioners (plaintiffs) agreed to sell land to defendant D. The contract did not refer to any plan, but the agents who signed it signed, at the same time, this memorandum, written upon a plan of the property. "Plan of the property sold

incorporation—if the contract in no manner refers to the plan, and there is no contemporaneous memorandum of reference—then the mere use and exhibition of a map or plan does not make it avail as a part of the agreement, nor as a representation concerning the subject-matter binding upon the vendor.(1) This latter rule has been applied under peculiar circumstances, and with some limitations, in a number of comparatively recent English cases, which are described in the foot-note.(2)

to and purchased by D., 23d October, 1874. N. B.—The property included in the purchase is edged with red color." *Held*, by JESSEL, M. R., and by the Court of Appeals, "that the plan was sufficiently incorporated and controlled the description in the written contract."

(1) *Peoffes of Heriot's Hospital v. Gibson*, 2 Dow. 301; *Squire v. Campbell*, 1 My. & Cr. 459. This rule is also held in England to apply to special acts of Parliament, such as acts of incorporation; so that maps, plans, etc., deposited cannot be used afterwards in construing the statute or in controlling its provisions, unless they are referred to by the statute, and thus incorporated into it. *North British Ry Co. v. Tod*, 12 Cl. & Fin. 722; *Beardmer v. London & N. W. Ry Co.*, 1 McN. & G. 112.

(2) I have placed these cases in the note because they contain no new rule and no general modification of that stated in the text, and because the conclusions reached by the court depended upon special facts. In *Peacock v. Penson*, 11 Beav. 355, 361, while the rule of the text, that a map not referred to nor in any manner incorporated into the contract does not become a part of it, was recognized; it was also held, that where a map, used by the vendor at the sale, showed the property as intended to be divided by certain new roads laid down in the plot, the vendor could not afterwards divide up the property in a manner so different from the mode thus indicated, that a class of resident population would naturally be attracted and collected entirely different from the class which would have been attracted if the original plan of dividing the lots had been carried out. Other cases, instead of making the exhibition of a map amount to a binding representation upon the vendor, hold that even when a map or plan is expressly referred to in the contract, it need not be followed with absolute exactness by the vendor in his subsequent dealing with the property—meaning thereby, of course, the remaining portion of the entire property delineated on the map which was *not* embraced in and sold by the particular contract in question. For example, in *Nurse v. Lord Seymour*, 13 Beav. 254, a map of the entire property was used, and was actually referred to in the contract in describing the portion of the land embraced therein and sold thereby; this map contained a street, the width of which was marked down as so many feet, but there was no clause or provision of the contract specially referring to this portion of the map as intended to be binding; and it was held not to be a part of the agreement, and not to prevent a subsequent change in the width of the street. Also, in *Randall v. Hall*, 4 DeG. & Sm. 343, the printed "particulars" of the sale referred to an accompanying plan, on which roads were so laid out that all the lots fronted upon some one of them, and the roads were even marked out on the land itself, although not actually made, and yet, because there was no provision in the "particulars," nor in the contract, binding the vendor to open and maintain these roads, it was held that the purchasers of lots were not entitled to have the roads so laid out and made. In all the foregoing cases the representations (if any) of the maps were promissory; it has been held that where an accompanying map or plan (not incorporated

SEC. 334. *Performance of the condition in conditional contracts.*—Conditions may be precedent or subsequent. In the case of the latter the estate vests, or the right accrues, subject to be divested or defeated upon a breach of the condition ; but, in case of the former, no estate vests, or right accrues, until the happening of the event which constitutes the condition. Where a contract is thus conditional—that is, where it rests upon a condition precedent, until the performance of the condition it cannot be enforced, because, until that time, there is no true contract. But upon the performance of the condition it becomes absolute to all intents and purposes, the same as though it had been originally framed so as to be absolute and not resting upon a condition. The fact that a contract depends upon a condition precedent, which has not yet been performed, is always a complete defense to a suit for its specific enforcement.(1) Equity, therefore, never relieves against the non-performance or breach of conditions precedents, since no estate vests, or right accrues, as long as the condition thus remains unperformed.(2) But since an estate does vest, or right accrue, in case of a condition subsequent, subject to be defeated on the breach, equity can and does grant relief in case of the breach of such a condition, provided that adequate compensation can be made.(3)

into the contract so as to become a part of it), represents the then existing state or condition of the property, its effect upon the rights of the vendee is not any greater than an actual view of the property by him would produce. In *Fewster v. Turner*, 11 L. J. Ch. 161, a plan of several lots showed a well on lot four communicating with a reservoir on lot two, and this reservoir communicating with an inn on lot one. The plaintiff, after inspecting this plan, purchased lot one, with the inn, and the vendor afterwards sold lots four and two without excepting or reserving any water right for lot one, and it was held that the plaintiff was not entitled to any compensation from him in respect of the loss of the water right. The correctness of this decision may well be doubted, and is doubted by Lord Sr. LEONARDS. See Sugden on Vendors, p. 20.

(1) *Regents Canal Co. v. Ware*, 23 Beav. 583, per Sir J. ROMILLY, M. R. ; *Lanning v. Cole*, 3 Green's Ch. 229, if defendant contracts to do something on the performance of certain conditions by the plaintiff, and the plaintiff performs, a specific execution will be granted against the defendant. *Dilly v. Barnard*, 8 Gill. & Johns. 170, plaintiff enforcing a conditional contract must show that he has fully performed the conditions, on his part, to be done ; as, for example, the plaintiff contracts for a lease on the performance by himself of certain acts, and takes possession of the land but fails to perform the conditions, he cannot compel an execution of the lease. *Jones v. Roberts*, 6 Call. 187 ; *Harvie v. Banks*, 1 Rand. 403 ; *Armstrong v. Wyandotte Bridge Co.*, *McCahon* (Kans.), 166 ; *Eppinger v. McGreal*, 31 Tex. 147.

(2) *Turnpike Co. v. Churchill*, 6 Monr. 427.

(3) *Wells v. Smith*, 2 Edw. Ch. 78 ; *Chipman v. Thompson*, Walk. Ch. 405 ; *Walker v. Wheeler*, 2 Conn. 299 ; *De Forrest v. Bates*, 1 Edw. Ch. 394 ; *Stuyvesant v. Davis*, 9 Paige, 427, per WALWORTH, Ch. As to how far contracts made

SEC. 355. No relief, however, will be granted in case of a subsequent condition if the breach of it was intentional, willful, nor where it will not admit of compensation. When, however, the only default of the plaintiff is delay, and the position of the defendant has not been materially changed thereby, a performance after the stipulated time may entitle the plaintiff to a decree for a specific execution, since mere lapse of time is not, in general, a sufficient ground in equity for the refusal of relief.(1) A forfeiture caused by the non-payment of money, however express may be the language of the contract, will, as a general rule, be relieved from, on the theory that interest is a sufficient compensation.(2) But the failure to pay must not be willful, nor the

by railway corporations, or railway promoters, are conditional upon the actual building the railway, in England, see *Webb v. Direct London, etc., R'y Co.*, 1 DeG. M. & G. 521; *Lord James Stuart v. London & N. W. R'y Co.*, 1 DeG. M. & G. 721; 5 H. L. Cas. 351; *Hawkes v. Eastern Counties R'y Co.*, 1 DeG. M. & G. 737; 5 H. L. Cas. 331; *Gage v. Newmarket R'y Co.*, 18 Q. B. 457; *Edinburgh, etc., R'y Co. v. Philip*, 2 McQueen, 514.

(1) *Vernon v. Stephens*, 2 P. Wms. 66; *Edgerton v. Peckham*, 11 Paige, 352, 359; *De Camp v. Feay*, 5 S. & R. 323, 325; *Clark v. Lyons*, 25 Ill. 105; *Snyder v. Spaulding*, 57 Ill. 480, 484. In *Edgerton v. Peckham*, *supra*, the vendor agreed to sell a lot for \$300, one-third to be paid down, and the rest in one and two years, possession to be delivered at once; and it was also agreed that if the vendee made default in either of the latter two payments, the vendor should not be bound to fulfill, but the vendee should forfeit what he had before paid, and should surrender up the land. The vendee paid the \$100 down, took possession and made valuable improvements, and paid the first installment of the residue, but delayed in paying the last installment. The vendor made no demand, and did not tender a deed, but when, after a delay of a few days, the purchaser offered the money, the vendor refused to accept it, and claimed that the contract was avoided. The vendee sued for a specific performance, which was granted by the V. C. On appeal, the chancellor held that the case differed in its principle from *Wells v. Smith*, 7 Paige, 22. In that case the condition was precedent; the deed was to be delivered on a certain day, and the purchase-price secured by a bond and mortgage, and the vendee was also to build a house of a prescribed size before that date, or, instead thereof, was to pay \$1,000 of the price, and by the express terms of the contract the deed was not to be given until all these things were done. The vendee did none of them; he had, in fact, only paid for the use of the land, and had failed to fulfill what was a condition precedent. If, in the contract then before the court, the meaning was, that if the vendee did not pay the last installment as soon as it was due, he should lose what he had already paid, and the vendor might keep both the money and the land, a court of equity would not allow such an intention to be carried into effect. The decision of the V. C. was, therefore, affirmed.

(2) *Wells v. Smith*, 7 Paige, 22, 24; *Edgerton v. Peckham*, 11 Page, 352, 359; *Sanborn v. Woodman*, 5 Cush. 36; *De Camp v. Feay*, 5 S. & R. 323, 326; *Remington v. Irwin*, 2 Harris, 143, 145; and the default of a vendee will be waived by the vendor's accepting payment of the balance of the price after the condition broken. *Grigg v. Landis*, 21 N. J. Eq. 494.

delay in payment be unreasonably long, and the plaintiff seeking relief from his default must show that it was not intentional, and has not caused irreparable injury to the defendant.(1) A failure to perfect the title or to give a conveyance at the time stipulated, is not, however, always excused.(2) And equity will not interpose to relieve against a subsequent breach of condition or forfeiture, unless the default was accidental or through mistake—or at least not intentional or willful—nor unless adequate compensation can be made to the party suffering from the omission.(3)

SEC. 336. The result is that when the intention from the whole agreement is plain, that payment or the perfecting and giving a good title, at or before a certain specified time, shall be a prerequisite to the vesting of any right under the contract, the provision is in the nature of a precedent condition, and must be complied with, for equity cannot relieve against the non-performance of such a condition by making a subsequent offer to perform the same as an actual compliance with the terms as they were agreed upon by the parties. On the other hand, if the intention, as shown by the contract, is to vest a right under it in the purchaser at once, such a right as would pass to his heirs or devisees, then a default in performance at the time, according to the terms, if not intentional or willful, and if not irreparably injurious, will be relieved against. This subject is more fully discussed, and many additional cases are cited in the subsequent section upon "Time of Performance."

SEC. 337. The entry of the purchaser into possession, together with his part payment of the price, or his making valuable improvements, may, of themselves, be a sufficient ground of relief to a defaulting purchaser, when, perhaps, relief could not be granted, if asked for upon the very terms of the contract; for the contract cannot be made

(1) *Hancock v. Carlton*, 6 Gray, 39; *Jones v. Robbins*, 29 Me. 351; *Hall v. Delaplain*, 5 Wisc. 206. In *Hall v. Delaplain*, the vendee gave notes for the price, and a stipulation that if said notes were not paid when due, "the vendor should have the option of declaring the contract forfeited," was held to be a subsequent condition, and default in payment at the day was relieved against, the purchaser having tendered the money on learning that the vendor intended to enforce the forfeiture. In *Jones v. Robbins*, *supra*, the vendee had delayed in all his payments, and still was allowed a specific enforcement, on proof that his delay to pay the first installment was due to his being taken sick when away from home, and his subsequent defaults were caused by the vendor's claim that the contract had been forfeited.

(2) See *Wells v. Smith*, 7 Paige, 22, 23, 26.

(3) *Jones v. Robbins*, 29 Me. 351; *Hill v. Barclay*, 16 Ves. 402; 18 Ves. 56; *Reynolds v. Pitt*, 19 Ves. 134; *Paschall v. Passmore*, 3 Harris, 295, 306.

a means of surprising and oppressing a purchaser who has thus gone on under the belief that his rights were secure, and expended money and otherwise changed his legal position.(1) Whenever, also, the plaintiff's delay or default in performing the terms and conditions on his part, at the time specified, is caused by the defendant's own neglect, laches, or other conduct, such omission will not be a ground for refusing the relief which he asks, no matter how express may be the provision of the contract requiring a punctual performance and making it essential; a defendant cannot rely as a defense upon a breach which he himself has caused.(2) A vendor, therefore, who cannot make out a clear and good title, cannot set up, in defense, the plaintiff's delay in payment, even though there is a stipulation that the contract shall be avoided if the payment is not made at the time.(3) A condition that the title shall be made, or the price shall be paid, on or before a day named, may be waived by the party entitled to its performance; and if such party thus waives the exact performance at the day, or if he goes on treating the agreement as still binding after default has been made, he cannot afterwards turn around and set up the delay or default as creating a forfeiture, and therefore, a defense.(4)

SEC. 338. Whether a contract is conditional or absolute, and if conditional whether it is precedent or subsequent, depends upon the intention of the parties gathered from the entire agreement. The condition may, of course, be expressed in formal and technical language, so as to leave no question as to its existence or as to its nature. But this is by no means necessary. If, from the language of the entire contract, the intention of the parties is found to be such that the agreement is based upon a condition, this intention being ascertained, must be followed as far as the rules of equity will permit. In cases of doubtful construction, the courts lean in favor of a subsequent rather than a precedent condition, because the latter tends to defeat the operation of the contract. In distinguishing between these two kinds of conditions, the rule of construction is settled that if the act or event which constitutes the condition does not necessarily precede or accompany the vesting of the estate, or the accruing of the

(1) See *Edgerton v. Peckham*, 11 Paige, 352; *Bellamy v. Ragsdale*, 14 B. Monr. 293; and see *Hoag v. Owen*, 60 Barb. 34.

(2) *Potter v. Tuttle*, 22 Conn. 512; *Snyder v. Spaulding*, 57 Ill. 480. 487.

(3) *Converse v. Blumrich*, 14 Mich. 109; *Wallace v. McLaughlin*, 57 Ill. 53.

(4) *Ewing v. Gordon*, 49 N. H. 460; *Sharp v. Trimmer*, 9 C. E. Green, 422; *Beatson v. Nicholson*, 6 Jur. 620.

right, so that such act or event may as well be done after as before such vesting of the estate or accruing of the right; or if, from the nature of the act to be done, and the time required for its performance, it is evidently the intention that the estate shall first vest, or the right shall accrue, and that the purchaser or grantee shall do the act after taking possession, then the condition is a subsequent one and not precedent.(1)

SEC. 339. II. *The plaintiff's inability, when vendor, to give a good title, or to convey the subject-matter as specified in the contract.*—If a vendor agrees to convey a certain amount of land, or an estate of any certain kind—*e. g.*, a leasehold for twenty-one years—or to give a title of a specified quality, and is unable to fulfill his contract exactly; that is, is unable to give the whole amount of land, or an estate of as high a character or as great extent, or to make a title as described without some defect or incumbrance, the law holds him as utterly failing, and as completely incapacitated from any legal mode of enforcement, and the purchaser may recover back any deposit he has paid, even though the vendor should offer compensation.(2) The doctrine of equity is somewhat different. In equity, if the vendor can give the purchaser *substantially* what he agreed to give, then he can obtain a decree of specific performance, even though he may be unable to comply with the literal and exact terms of his contract; but in such case he may be compelled, as an incident of his remedy, to give the purchaser compensation for the difference in value between what the latter was to receive by the contract, and what he actually obtains by the decree.(3) I shall discuss the subject of compensation in a following

(1) *Underhill v. Saratoga, etc., R. R.* 20 Barb. 455. In *Nicoll v. N. Y. & Erie R. R.*, 12 N. Y. 121, a conveyance was made to a corporation upon the express condition that the company should construct its railroad within the time prescribed by the act, and this was held to be a condition subsequent, since, of necessity, the company was entitled to possession of the land, and the act could only be done after the vesting of the estate.

(2) *Farrer v. Nightingal*, 2 Esp. 639; *Hibbert v. Shee*, 1 Camp. 118; *Duffell v. Wilson*, 1 Camp. 401.

(3) *Halsey v. Grant*, 13 Ves. 77, per Lord Ch. ERSKINE; *Guest v. Homfray*, 5 id. 818; *Mortlock v. Buller*, 10 Ves. 373; *Vignolles v. Bowen*, 12 Ir. Eq. Rep. 194. In *Halsey v. Grant*, Lord ERSKINE said: "Equity does not permit the forms of law to be made instruments of injustice; and will interpose against parties attempting to avail themselves of the rigid rule of law for unconscientious purposes. Where, therefore, advantage is taken of a circumstance that does not admit a strict performance of the contract, if the failure is not substantial, equity will interfere. If, for instance, the contract is for a term of ninety-nine years in a farm, and it appears that the vendor has only ninety-eight or ninety-seven years, he must be non-suited in an action at law; but equity will not so deal with him; and if the



section ; in the present subdivision, I shall examine the general doctrine that the vendor must *substantially* perform, so far as it can be separated from the particular questions arising from the delay in performance, and the right to compensation from a defect of performance. If however, the vendor's failure to perform is substantial and material, not admitting of adequate and reasonable compensation, he can have no equitable remedy, and will even be compelled, by a court of equity, to repay the deposit which he may have received.(1)

SEC. 340. It may be stated, as a general proposition, that if a vendor cannot give a good title, and deliver possession at the time specified in the agreement, he cannot obtain a decree of specific execution against the purchaser in a case where time is essential ; that is, where completion of the contract and delivery of possession at the stipulated time are material to the purchaser, and he is then ready and willing to accept the conveyance and pay the price.(2) This proposition, however, does not apply to those cases in which time is not essential, the consideration of which is postponed to the next succeeding section. The vendor must certainly do all within his power to perfect his title and complete the contract within a reasonable time, or he will lose all claim to the aid of a court of equity ;(3) and that aid will be withheld from a vendor who has fraudulently concealed the defect which caused the delay in perfecting his title.(4)

SEC. 341. There are cases which hold that if the vendor did not own, at the time of making his contract, what he agreed therein to sell, equity will not enforce a specific performance upon an unwilling purchaser, even though he acquired the ownership, and was able to give a good title to it by the time specified.(5) These decisions, however, can hardly be reconciled with the general scope of the authorities on this point, as will appear hereafter. The reasoning on

other party can have the substantial benefit of his contract, that slight difference being of no importance to him, equity will interfere. Thus was introduced the principle of compensation now so well established—a principle which I have no disposition to shake."

(1) As, for example, a vendor had agreed to convey a term of sixteen years while he could only give one for six years. *Long v. Fletcher*, 2 Eq. Cas. Abr. 5, pl. 4 ; *Spunner v. Walsh*, 11 Ir. Eq. Rep. 597.

(2) *Watts v. Waddle*, 6 Pet. 389 ; *McKay v. Carington*, 1 McT. 51 ; *Cooper v. Brown*, 2 McLean, 495 ; *Tiernan v. Roland*, 3 Harris, 429 ; *Taylor v. Porter*, 1 Dana, 422.

(3) *King v. Hamilton*, 4 Peters, 311 ; *Tiernan v. Roland*, 3 Harris, 429 ; *Grundy v. Ford's Ex'ors*, *Littells Select Cases*, 129 ; *Rider v. Gray*, 10 Md. 282, 286.

(4) *Christian v. Cabell*, 23 Gratt. 82.

(5) *Hurley v. Brown*, 98 Mass. 545 ; *Tiernan v. Roland*, 3 Harris, 429, 436 ; *Pipkin v. James*, 1 Humph. 325, 328.

which they seem to rest is, that when such a contract is made it is wholly uncertain whether the vendor will complete it, and, therefore, he ought not to insist as a right upon the vendee's accepting that which he, the vendor, might not have been able to convey; that although the contract is in form absolute, yet it is in reality contingent—while the purchaser may be ignorant of this latter quality.(1) This reasoning could not, of course, apply where the contract itself disclosed the contingency, and the vendee was, therefore, informed of the true condition of the vendor's personal interest and future expectations. If, therefore, the agreement shows that the vendor is not at the time owner of the subject-matter, or has not a clear, unincumbered title to it, but is to acquire the ownership or perfect the title, and then convey, within the time specified, these circumstances would present no obstacle to a specific enforcement of the contract by the vendor.(2) Where the vendee agrees to purchase a title which he knows to be defective, or the interest, whatever it may be, which the vendor has, this contract will be enforced at the vendor's suit, if not illegal on the ground of maintenance.(3)

SEC. 342. It is also settled, that if the vendor has a good equitable title to the land—as, for example, he holds the land under a land contract—the mere fact that the legal title was outstanding at the time of making the agreement is no objection to his enforcing performance after he has obtained such legal title.(4) In England it very fre-

(1) See *Lay v. Huber*, 3 Watts, 367.

(2) *Dresel v. Jordan*, 104 Mass. 407; *Old Colony R. R. v. Evans*, 6 Gray, 25. The rule, as generally accepted by the authorities, is thus laid down in *Dressell v. Jordan*: "If the vendor can make good the title he has contracted to convey" (within time to satisfy the terms of the contract and the doctrines of equity), "it is not requisite that he should have such title and capacity to convey, or such means, at the time of the agreement. \* \* \* It is sufficient, upon a contract made in good faith, if he is able to make the stipulated title at the time when, by the terms of his agreement, or by the equities of the particular case, he is required to execute the conveyance in order to entitle himself to the consideration." *Richmond v. Gray*, 3 Allen, 25; and see, to the same effect, *Thompson v. Myrick*, 20 Minn. 205; *Dalzell v. Crawford*, 1 Pa. L. J. Rep. 155; *Christian v. Cabell*, 22 Gratt. 82.

(3) *Brashier v. Gratz*, 6 Wheat. 528.

(4) *Tiernan v. Roland*, 3 Harris, 429; *Lay v. Huber*, 3 Watts, 367. In the first of these cases it was held, that where the vendee contracted to purchase the fee, he would not be compelled to accept a life estate, nor any other estate, in which the vendor had no right or interest at the time of making the agreement; but that if the vendor held the equitable title when he made the agreement, and afterwards and before the hearing acquired the legal title, he could compel a specific performance.

quently happens that the dry legal title is outstanding in trustees, and a specific performance is there sometimes compelled, although such legal title is not got in by the vendor, and is not, therefore, conveyed to the vendee; but this is only done in cases where the equitable title conveyed is as good for all purposes as the full legal title would be.(1) In this country there is no such constant separation of the titles, and the legal title must be conveyed in all cases except where the contrary is expressly stipulated. The vendor cannot compel a specific performance, unless he has—in this country—a good, clear, marketable title; and a reasonable doubt on this head will prevent his obtaining the remedy.(2) An incumbrance on the land will not, necessarily, prevent a specific performance at the vendor's suit, because the purchase-money may, by order and under direction of the court, be applied in discharge of the mortgage debt and removal of the lien.(3) But the vendee will not be compelled to accept land covered by an incumbrance which cannot thus be removed, either because the amount of it is in dispute, or because the purchase-price is not large enough to pay off the debt.(4)

SEC. 343. *Different estate or interest from that which vendor agreed to sell.*—In a preceding paragraph the general doctrine of equity was stated that a substantial compliance by the vendor was sufficient if compensation could be made for the difference; but that if the failure to carry out the contract was material, the vendor could not enforce it upon an unwilling purchaser, even by offering compensation. I proceed to show, by examples, what failures have been held *material*; the cases where the defect is immaterial and which admit

(1) See *Freeland v. Pearson*, L. R. 7 Eq. 246.

(2) *Richmond v. Gray*, 3 Allen, 25; *Sturtevant v. Jaques*, 14 Allen, 523; *Bumberger v. Clippinger*, 5 W. & S. 311; *Speakman v. Forepaugh*, 8 Wright, 363; *Swayne v. Lyon*, 17 P. F. Smith, 436; *Griffin v. Cunningham*, 19 Gratt. 571; *Butler v. O'Hear*, 1 Dessaus. 382; *Morgan v. Morgan*, 2 Wheat. 290; *Sohier v. Williams*, 1 Curtis C. C. 479. But a mere possibility or suspicion of defect is not enough. *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400. See the section on *Doubtful Title ante*, in chapter 2.

(3) *Guynett v. Mantel*, 4 Duer, 86; *Marsh v. Wyckoff*, 10 Bosw. 202; *Thompson v. Carpenter*, 4 Barr. 182; *Wallace v. McLaughlin*, 57 Ill. 53; *Tiernan v. Roland*, 3 Harris, 429. This last case holds, that when vendor gave a mortgage on the land after the contract, this did not prevent his enforcement of the contract, if such mortgage was satisfied before the commencement of the suit. See *Brewer v. Herbert*, 30 Md. 301.

(4) *Hinckley v. Smith*, 51 N. Y. 21; *Garnet v. Macon*, 6 Call. 309; *Christian v. Cabell*, 22 Gratt. 82; *Wallace v. McLaughlin*, 57 Ill. 53; *Snyder v. Spaulding*, 57 Ill. 480; *Walsh v. Barton*, 24 Ohio St. 28; *Heimbürg v. Ismay*, 35 N. Y. Super. Ct. 35; *Lesley v. Morris*, 9 Phila. 110.

of compensation, are to be examined in another section. I shall consider, first, the cases in which the kind or extent of the interest actually given is different from that contracted to be sold.

SEC. 344. If a vendor agrees to give a lease, or to assign a lease, he cannot force the acceptance of an *under-lease* upon an unwilling purchaser.(1) A vendor cannot compel a specific performance when he can only give a different kind of estate in the land, in England, land held by a different tenure from that described in the contract; for a difference or defect, however small in pecuniary value, is not "immaterial" when it extends to or affects the entire interest described in the agreement. Thus, a contract to convey freehold land cannot be enforced by a vendor who has only a lease-hold interest, even if the term is so long that its value is nearly equal to that of a freehold estate.(2) Where a purchaser contracted for an estate in fee simple, subject to a perpetual rent-charge, and it turned out that the vendor's only interest was a perpetual rent-charge on the land, it was held that the vendor was not entitled to a specific performance.(3)

(1) *Madeley v. Booth*, 2 DeG. & Sm. 718. In the contract the houses sold were described as held for the residue of a term of 99 years from June 24, 1833, but were not expressly stated to be held by an original lease. It was further provided that the vendee should not call for the lessor's title, and any error or misstatement as to the terms of years should not vitiate, but should be the subject of compensation. It turned out that the title was an *under-lease* for a term less by 3 days than the 99 years granted by the original lease. The vendor sued for a specific performance offering compensation. The suit was dismissed, with costs, by KNIGHT-BRUCE, V. C. "I cannot consider a title under this under-lease to be substantially the same thing as an assignment of the original term in the property. Among the inconveniences incident to an under-lease, as distinguished from an assignment of the original term, it is sufficient to mention that if the under-tenant were to tender the rent to the head landlord, he would not be bound to accept that tender. There is no privity of contract, in fact or in law, between the head landlord and the under-tenant." See, however, in *Darlington v. Hamilton, Kay*, 538, the observations of PAGE WOOD, V. C.

(2) *Drewe v. Corp*, 9 Ves. 338; 1 S. & S. 201, n; *Wright v. Howard*, 1 S. & S. 190; *Barton v. Lord Downes*, 1 Flan. & K. 505. As further examples in England, a vendor selling freehold cannot compel the vendee to accept copyhold. *Twining v. Morrice*, 2 Bro. C. C. 263; *Hicks v. Phillips*, Prec. Ch. 575; unless the conditions of the sale required him to accept; see *Price v. Macauley*, 2 DeG. M. & G. 349; also, if vendee contracts for a copyhold estate, he will not be forced to accept the land if it is partly freehold. *Ayles v. Cox*, 16 Beav. 23. But it seems that if a vendor has contracted to convey an estate represented to be copyhold equal in value to freehold, and the estate turns out to be freehold, he can, nevertheless, force it upon the purchaser. *Twining v. Morrice*, 2 Bro. C. C. 326; unless it is expressly stipulated that the contract should be void, if it appears that any part of the estate was freehold. *Daniels v. Davison*, 16 Ves. 249.

(3) *Prendergast v. Eyre*, 2 Hogan, 81.

The objection to a difference in the kind of interest, or of the tenure, may, however, be waived by the purchaser's conduct.(1)

SEC. 345. The following are further instances in which the general doctrine has been applied. If the vendor has contracted to sell an estate as an entirety, and he is only a tenant in common, or other co-owner, he cannot compel the purchaser to accept an undivided share upon any payment of compensation.(2) If the vendor contracts to sell an estate in possession, he cannot obtain a specific performance by conveying an estate in remainder after an existing precedent life estate.(3) The same rule prevails when the vendor's estate is subject to reservations, or rights of user in favor of third persons, which are necessarily incumbrances upon the property, and which are not provided for or mentioned in the contract, examples of which are collected in the note.(4)

(1) As, for example, by his proceeding with the negotiation after learning the true character of the vendor's interest. *Fordyce v. Ford*, 4 Bro. C. C. 494; *Burnell v. Brown*, 1 J. & W. 163; *Martin v. Cotter*, 3 J. & Lat. 496. But if the vendee object, although he may be forced to complete the contract, yet he will be entitled to compensation. *Calcraft v. Roebuck*, 1 Ves. 221.

(2) The rule is very different from that which controls the decision where the parties are reversed. The vendee in such case may insist upon the vendor's conveying his partial interest, and the vendor cannot set up in defense that he does not own the entirety; but the vendor cannot force his share upon an unwilling purchaser. *Atty.-Gen. v. Day*, 1 Ves. Sen. 218; *Roffey v. Shallcross*, 4 Madd. 227; *Dalby v. Pullen*, 3 Sim. 29; *Casamajor v. Strode*, 2 My. & K. 726. In *Atty.-Gen. v. Day*, tenants in common had contracted to sell their whole estate; one of them died, and it was held that the survivors could not force their remaining shares upon the purchaser. See, also, *Erwin v. Myers*, 10 Wright, 96; *Napier v. Darlington*, 20 P. F. Smith, 64; *Clark v. Reins*, 12 Gratt. 98. In *Erwin v. Myers*, the vendor contracted to sell land, and it turned out that he owned only an undivided share in it. *STRONG, J.*, while holding that the vendee could compel him to convey what interest he had, said: "His (the vendee's) position is not to be confounded with that of a vendor praying, in equity, for a specific performance. There is a settled distinction between the two cases. If a vendor cannot make out title to the whole of the subject-matter of the contract, equity will not compel the vendee to perform *pro tanto*."

(3) *Collier v. Jenkins*, Younge, 295; *Nelthorpe v. Holgate*, 1 Coll. 203.

(4) An estate subject to a right of sporting, *Burnell v. Brown*, 1 J. & W. 168; or to a right of digging for mines, *Seaman v. Vawdrey*, 13 Ves. 300; *Barton v. Lord Downes*, 1 Flan. & Kl. 505; where the minerals are reserved to the lord of the manor, *Upperton v. Nickolson*, L. R. 6 Ch. 436; where the estate was liable to keep a chancel in repair, *Horniblow v. Shirley*, 13 Ves. 81, cited as *Forteblow v. Shirley*, in 2 Sw. 223; where the interest is a mere sheep-walk and not a freehold, *Vancouver v. Bliss*, 11 Ves. 458; inchoate dower, *Schiffer v. Pruden*, 64 N. Y. 47. In regard to a variety of incumbrances, in the nature of rents and similar permanent charges, which are not uncommon in England, although practically unknown in this country, the following points have there been decided: A redeemed land tax was sold, described as charged upon three houses; in fact, it

SEC. 346. In all cases where the purchaser alleges that the estate or interest which the vendor proposes to convey in pursuance of his obligation, does not correspond with that described in the agreement and contracted to be sold, and, therefore, claims to be discharged entirely from all liability to accept, a court of equity will inquire whether the difference is so substantial and material as to defeat the vendor's remedial right, or whether it is so immaterial, incidental, or formal, that justice will be done by granting the relief with a compensation to the purchaser. A compensation even will not be awarded, and the vendee will be forced to accept the interest which the vendor has, if the defect or variation is obvious, plain, and palpable to the senses, or when the purchaser had actual notice of it at the time of entering into the agreement.(1)

consisted of three distinct sums, each charged on a separate house; it was held, that a specific performance could not be decreed against the purchaser, since there was no basis for a compensation, *Cox v. Coventon*, 31 Beav. 378; but where land is contracted to be sold, on which there are undisclosed quit-rents, or rent charges, if small in amount, it seems they will not prevent a specific performance at the vendor's suit, but will, of course, require compensation, *Esdaile v. Stephenson*, 1 S. & S. 121; *Bowles v. Waller*, 1 Hayes, 441; *Prendergast v. Eyre*, 2 Hogan, 94; *Portman v. Mill*, 1 Russ. & Myl. 696; and if land is sold as tithe-fee, but is, in fact, subject to a rent-charge in place of tithes, the vendor can compel the purchaser to accept with compensation. *Howland v. Norris*, 1 Cox, 59.

(1) *Dyer v. Hargrave*, 10 Ves. 505; *Oldfield v. Roand*, 5 Ves. 508; *King v. Bardean*, 5 Johns. Ch. 38; *Clark v. Seirer*, 7 Watts, 107, 112. In *King v. Bardeau*, the vendor sold two lots, forty-two and forty-three, lying contiguous on a street in New York city, in one parcel, to the same purchaser. The vendee afterwards found that the building on lot forty-two projected about twenty inches on to lot forty-three. He claimed that this prevented him from using the lot forty-three as he purposed to do when he purchased, viz., erecting a building on it twenty-two feet wide, with an alley on one side three feet wide, running from the street to the rear, and on this ground he defended. Chan. Kent held, that the defect, or variation, was patent and might have been discovered by a person of ordinary care, and was not ground for denying the vendor's relief; but at the same time he allowed to the vendee an abatement of the price by way of compensation. In *Clark v. Seirer*, *supra*, Gibson, C. J., applied the doctrine of open, obvious defects to the case of a purchaser who knows that the vendor has a wife, saying, that one buying under such circumstances, and knowing that the wife has a dower interest, and that she cannot be compelled to release it, takes upon himself the risk of the wife's refusal to join in the husband's deed, and must accept the vendor's conveyance without a release of dower. See, also, as to the effect of notice, *James v. Lichfield*, L. R. 9 Eq. 51; *Caballero v. Henty*, L. R. 9 Ch. 447. If the land is subject to prior outstanding rights in favor of third persons, such as easements, liens, and the like, and this fact was known to the vendee at the time of the contract, he must take the land, even when there is a specific enforcement, in its existing condition subject to such equities and rights. *Smoot v. Rea*, 19 Md. 398; *Smith v. Crandall*, 20 Md. 482; *Laverty v. Moore*, 33 N. Y. 658; *Hunter v. Bales*, 24 Ind. 299; *Dean v. Comstock*, 32 Ill. 173.

SEC. 347. *Defect of vendor's title.*—Intimately connected with the case last dissussed, and, perhaps, hardly to be distinguished from it, is that of a failure, total or partial, of the vendor's title. As a part of the doctrine that the plaintiff must perform all the material terms of the agreement on his part, the general rule is settled that a vendor who has entered into an entire contract, cannot enforce a specific performance upon an unwilling purchaser, unless he has a good title to the whole subject-matter, and to every part of it. In other words, the failure or defect of his title either to the whole land or to a part of it, is a sufficient ground for refusing the remedy which he seeks. Compensation will not, in general, obviate the objection, for a purchaser cannot equitably be compelled to pay a smaller price for a subject-matter which he did not agree to buy.(1) But this rule is not absolutely universal. When the vendor is unable to make title to a very small part of the land, and such portion is not material to the purchaser's possession and enjoyment of the property, so that the deficiency is susceptible of compensation, a specific performance will be geanted to the vendor with compensation to the vendee.(2) But

(1) *King v. Knapp*, 59 N. Y. 462; *Hoover v. Calhoun*, 16 Gratt. 109; *Jackson v. Ligon*, 3 Leigh, 161; *McKean v. Read*, 6 Litt. 395; *Bryan v. Read*, 1 Dev. & Bat. Ch. 78; *Reed v. Noe*, 9 Yerg. 283; *Cunningham v. Sharp*, 11 Humph. 116, 121; *Buchanan v. Alwell*, 8 Humph. 516; *Hepburn v. Auld*, 5 Cranch, 262; *Vreeland v. Blaauvelt*, 23 N. J. Eq. 483; *Dobbs v. Norcross*, 24 N. J. Eq. 327; *Jeffries v. Jeffries*, 117 Mass. 184; but a mere possibility of a defect is not such a failure of title as will defeat the vendor's suit. *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400.

(2) *McQueen v. Farquhar*, 11 Ves. 467; *Knatchbull v. Grueber*, 1 Madd. 153; *Bowyer v. Bright*, 13 Price, 698; *Carver v. Richards*, 6 Jur. (N. S.) 667; *Stoddart v. Smith*, 5 Binney, 355; *Foley v. Crow*, 37 Md. 51. In the latter case it was said: "Where a vendor is unable, from any cause not involving *mala fides* on his part, to convey each and every parcel of the land contracted to be sold, and it is apparent that the part that cannot be conveyed is of small importance, or is immaterial to the purchaser's enjoyment of that which may be conveyed to him, in such case the vendor may insist on performance with compensation to the purchaser, or a proportionate abatement from the agreed price if that has not been paid." This mode of apportioning relief has sometimes been carried to a great extent, far beyond the rule as now generally accepted. In *Shireley v. Davis*, cited 6 Ves. 678, a vendee had contracted for a house and a wharf—the vendor's title to the wharf failed, and yet the court compelled the vendee to take the house, although it appeared that he wanted the wharf to carry on his business. This decision has been repeatedly disapproved, and is not good law. See 1 Cox. 61, 62; 6 Ves. 679; 13 Ves. 78. 228, 427; *Stewart v. Alliston*, 1 Meriv. 26. As a fair illustration of an immaterial failure admitting compensation, see *Stewart v. Marquis of Conyngham*, 1 Ir. Ch. Rep. 534. The contract stated that the timber on the estate would be included, but the title to the timber on a small part of the land failed. There being no misrepresentation, the court allowed a specific per-

this exception is very limited. If the title fails to a portion of the land, however small, which is material to the vendee's possession and enjoyment of the remainder to which title can be made, the vendor must fail of obtaining a specific performance.(1)

SEC. 348. Where a contract, in addition to the main and substantial subject-matter for which a certain price is specified—as for example, an estate—includes also something as an adjunct which is small in value, and not material to the use and enjoyment of the main subject-matter, the failure of the vendor's title to this adjunct, or his inability to convey it, will not prevent him from compelling a specific performance in respect of the principal subject-matter.(2) Whenever, however, the adjunct is necessary to the full use and enjoyment of the main subject-matter, the vendor's inability to convey it will defeat his right to a specific enforcement, even with compensation.(3) If a vendor who contracted to give a good title to all the land embraced in the agreement, alleges in his bill of complaint that he

formance with compensation. See, also, *Magennis v. Fallon*, 2 Molloy, 590; *Shaw v. Vincent*, 64 N. C. 690; *Davison v. Perrine*, 7 C. E. Green, 87.

(1) *Shackleton v. Sutcliffe*, 1 DeG. & Sm. 609; *Perkins v. Ede*, 16 Beav. 193; *Peers v. Lambert*, 7 Beav. 546. In the last case the vendor agreed to sell a wharf on the Thames, with a jetty. This jetty was liable to be removed by the corporation of London, if they thought fit. The M. R., Lord LANGDALE, held that the jetty was necessary to the use and enjoyment of the wharf, and refused to decree a specific performance which would only convey a good title to the wharf. See, also, *Howard v. Kimball*, 63 N. C. 175; *Griffin v. Cunningham*, 19 Gratt. 571; *Taylor v. Williams*, 45 Mo. 80; *Shaw v. Vincent*, 64 N. C. 690; *Smith v. Turner*, 50 Ind. 367; *Havens v. Bliss*, 26 N. J. Eq. 363; *Botsford v. Wilson*, 75 Ill. 132; *Hinkle v. Margerum*, 50 Ind. 240; *Gregory v. Perkins*, 40 Iowa, 82; *Davison v. Perrine*, 7 C. E. Green, 87; *Walsh v. Barton*, 24 Ohio St. 23; *Holland v. Holmes*, 14 Flor. 390; *Page v. Greeley*, 75 Ill. 400; *Bogan v. Daughdrill*, 51 Ala. 312. There are cases which hold that the vendee cannot set up the defense of a defect in the vendor's title, as long as he is in possession of the land; in other words, that he can only rely upon such defect as a ground for a rescission and abandonment of the contract. See *Campbell v. Medbury*, 5 Biss. 33; *Sawyer v. Sledge*, 55 Geo. 152; *Garrett v. Lynch*, 45 Ala. 204. This is undoubtedly the correct rule if the vendee wishes to rescind the contract; he must then act without delay, and cannot claim to retain any benefits of the contract and to repudiate its burdens. But the rule is certainly inconsistent with those decisions, which are numerous, permitting the vendee to retain the land and the benefits of the contract, and at the same time demand and receive compensation for some defect or partial failure of the vendor's title or of the subject-matter.

(2) See cases in last preceding note; also *Richardson v. Smith*, L. R. 5 Ch. 648; *Stewart v. Metcalf*, 68 Ill. 109.

(3) As for instance, where the main subject-matter is a public house, and the adjunct is its fixtures and furniture, which are, of course, essential to the beneficial use of the building as a *public house*. *Darbey v. Whittaker*, 4 Drew. 134; *Jackson v. Jackson*, 1 Sm. & Gif. 184.



can make out a good title to all, it seems that the least defect or failure of title will be sufficient to prevent him from obtaining a decree, even with compensation to the purchaser.(1)

SEC. 349. A purchaser may, by his own act, remove all objection to the vendor's defect of title, and cut himself off from setting up that defect as a defense. This is so where the vendor is unable to make out a good title to the land, or a part of it, which he has agreed to sell, on account of some outstanding title in a third person, and the purchaser has himself bought up that outstanding title, or in some manner has become vested with it; such purchaser being thus able to complete the vendor's title, cannot rely on the vendor's inability, and will be compelled to perform, although he may be allowed the expense to which he has been put in obtaining the outstanding title.(2) Such cases are not very likely to occur in this country, except in the instance of outstanding liens and incumbrances, such as mortgages, dower rights, and the like. If a vendee should purchase the mortgage, or buy up the dower right, his case would plainly fall within the above principle, and he should be allowed the amount paid for his purchase.

SEC. 350. I have collected in the foot-note a number of recent cases illustrating the foregoing doctrine concerning the failure of vendor's

(1) In *Ashton v. Wood*, 3 Sm. & Gif. 436, the vendor agreed to give a good title to all the lands, and the contract expressly provided that compensation should be given for any errors in the amount or dimensions of the land; title failed to 1-30th part, which was not essential to the enjoyment of the remainder; but the bill alleged that the plaintiff (vendor) could make a good title to *all*; *Held*, the plaintiff was not entitled to a specific performance with compensation.

(2) *Murrell v. Goodyear*, 2 Giff. 51; 1 DeG. F. & J. 432; *Peter v. Nicolls*, L. R. 11 Eq. 391; *Hume v. Pocock*, L. R. 1 Eq. 662. In *Hume v. Pocock*, the master had reported that vendor could not make a good title: but it appeared from the evidence that the vendee (the defendant), had, since the contract, by his own act, acquired the means of curing the defect and perfecting the title, and, therefore, the defendant could not rely on the defect as a defense, and plaintiff was permitted to amend his bill. In *Peter v. Nichols*, *supra*, a vendor's suit, the purchaser set up a voluntary settlement made by the plaintiff as a defense, but alleged his willingness to complete on receiving a good title. He had been put into possession as vendee, had paid part of the price, had paid off a mortgage and obtained a conveyance of the legal estate and possession of the title deeds. *Held*, that defendant had a sufficient title, and plaintiff should have a decree. In *Murrell v. Goodyear*, *supra*, there was an outstanding legal title which was a defect, and the defendant—the vendee—after objecting to the plaintiff's title, and giving notice of intention to rescind, secretly bought up this outstanding title, and it was held that he had obviated all objection and was bound to complete. See, also, *Weems v. Brewer*, 2 Har. & Gill. 390; *Westall v. Austin*, 5 Ired. Eq. 1; *Kindley v. Gray*, 6 Ired. Eq. 445.

title, in some of which the title was held sufficient, and in others insufficient, for a decree of specific performance.(1)

SEC. 351. *Failure of title to one or more of separate lots.*—When the vendor sells two or more estates or lots at one time, and for one sum, the contract is entire, unless there should be some express clause making it separable, and the failure of the title to one of the estates or lots is a complete bar to the vendor's enforcing a performance upon the purchaser as to the others, to which the title is good. The reason

(1) *Sales by trustees.*—*Tolson v. Sheard*, L. R. 5 Ch. D. 19. The plaintiffs, trustees, held two estates on distinct trusts, and made one mining lease of the two estates. *Held*, that they had no power to make such a lease, and a specific performance at their suit refused. *Query.*—Whether a lease by trustees by one demise of two estates held upon distinct trusts, is not a breach of trust, per HALL, V. C., and Court of Appeals; *Morris v. Debenham*, L. R. 2 Ch. D. 540. A trustee having a discretionary trust under a will to sell land at such a price as he should see fit, with power to postpone the sale, leased the land for thirty years, with the concurrence of the beneficiaries. Before the lease expired the land was put up for sale by the trustee and the lessee jointly—all the facts being fully disclosed in the particulars of sale—a sale was effected, and the purchase-money was then apportioned between the two interests (the trustee and the lessee) according to the valuation of a skilled valuer. *Held*, the vendee, in a suit by the vendors, could not insist on the concurrence of the beneficiaries on account of the apportionment not having been made before the sale, and he was bound to take the title. *Cavendish v. Cavendish*, L. R. 10 Ch. 319. Two lots belonging to the same estate, but held under separate trusts, were sold together for one lump sum, by order of the court in an administration suit, and the proceeds were brought into court. Vendee objected to the title because no order for apportionment of the proceeds, between the two different trusts, had been made before the sale. *Held*, objection was groundless since the money was in the custody of the court, which would control its disposition. See, also, *Rede v. Oakes*, 4 DeG. J. & S. 505. *Constructive notice to the purchaser of defect in the title.*—*Caballero v. Henty*, L. R. 9 Ch. 447. A public house was offered for sale, the conditions of sale stating that it was “in the occupation of a tenant.” A brewer bought it for the purpose of using it for the sale of his beer. He afterwards found that it was held by another brewer under a lease which had yet eight years to run. *Held*, on appeal affirming the decision of JESSEL, M. R., that the vendee was not bound to ascertain the terms of the tenancy from the tenant in occupation—*i. e.*, the language of the conditions was not a constructive notice—and as the title was defective the vendor could not force it upon the purchaser. *James v. Lichfield*, *infra*, was commented upon and disapproved. It was also said, that the doctrine of *Daniels v. Davison*, 16 Ves. 249, does not apply as between the vendor and the vendee while the matter still rests in the contract; it refers only to equities between the vendee and the tenant after the legal estate has passed to the vendee. *James v. Lichfield*, L. R. 9 Eq. 51, per Lord ROMILLY, M. R., was not a vendor's suit, and is, therefore, not exactly in point, but it has a direct bearing on the question. Vendor agreed to sell certain land which vendee knew to be in the occupation of a tenant, and afterwards discovered to be held under a lease for twenty-one years. Vendee sued for a specific performance, with compensation. *Held*, that vendee was affected with notice of the true state of the title, and was not, therefore, entitled to

for this rule is that the court will not, and indeed cannot, make an apportionment of the whole price among the lots, and determine what amount shall be charged to those whose title is good, and what to those of which the title has failed, so as to bind an unwilling purchaser.(1) On the other hand, if several distinct estates are sold for separate and distinct prices, a separate price to each lot, although sold at the same time, and much more if sold at different times, the contract is divisible, unless there is a clear intention, from its language, that it is to be entire; and the failure of the vendor's title to one or more of the lots or estates does not prevent him from compelling a specific performance in respect of the others, to which his title is good. The difficulty in the former case does not exist in this, for the parties have themselves made an apportionment of the price.(2) In connection

any compensation—i. e., abatement from the price. This decision can hardly be supported under the criticism of the preceding case. See, also, as having some bearing, *Hughes v. Jones*, 3 DeG. F. & J. 307. In *Jeffrys v. Fairs*, L. R. 4 Ch. D. 448, a specific performance was enforced against the vendee, although the main subject-matter (a vein of coal) failed, because he had, in reality, bought whatever interest the vendor had; both contracted in equal ignorance, and defendant took his chance of what there was of minerals under the surface. *Misdescription and mistake*.—*Denny v. Hancock*, L. R. 6 Ch. 1, a misdescription or mistake as to what was included in the property sold, which was held to be the plaintiff's fault. The court said, if a vendee insists upon something connected with the conveyance with which the vendor refuses to comply, and the vendee thereupon assumes to rescind, and the court holds that vendee was right in his contention, *Query*,—whether a specific performance would ever be decreed against the unwilling vendee, with compensation. And see *Baskcomb v. Beckwith*, L. R. 8 Eq. 100; *Phillipson v. Gibbon*, L. R. 6 Ch. 426; *Minton v. Kirwood*, L. R. 3 Ch. 614; 1 Eq. 449.

(1) *Prendergast v. Eyre*, 2 Hogan, 89; *Cunningham v. Sharp*, 11 Humph. 116.

(2) *Poole v. Shergold*, 2 Bro. C. C. 118; 1 Cox, 273; *Lewin v. Guest*, 1 Russ. 325; *Harwood v. Bland*, 1 Flan. & Kel. 540; *Casamajor v. Strode*, 2 My. & K. 724. It must be understood that the lots or estates are really distinct and separate. The rule will not apply, but the general doctrine will control, if the portion to which the title fails is the really important part of the purchase, or is material to the beneficial use and enjoyment of the residue. Thus, in *Poole v. Shergold*, *supra*, several lots were thus sold, and the title failed as to two of them. Lord KENYON, M. R., said he must take it for granted that the two lots were not so complicated with the others as to entitle the purchaser to resist the whole; but he added: "If a purchase was made of a mansion-house in one lot, and farms, etc., in others, and no title could be made to the lot containing the mansion-house, it would be a ground to rescind the whole contract." In *Foley v. Crow*, 37 Md. 51, four lots had been thus sold, and title failed as to one, and this was held not to impair the contract respecting the other three, there being no evidence to show that the three were in themselves any less valuable by the loss of the fourth. In *Stoddart v. Smith*, 5 Binney, 355, defendant had agreed to purchase forty-five lots in different parts of Washington. The contract in respect to all was made at

with the rule last stated, it is settled by the weight of authority, that where lots are sold, either one after another, or at the same time, *uno flatu*, for separate and distinct sums, the contract is, in respect to its specific enforcement, *prima facie* divisible as to each lot—that is, the sale of each lot constitutes a separate contract, and a failure of title to one or more will not be an obstacle to an enforcement at the suit of the vendor as to the remainder.(1)

SEC. 352. *Deficiency in the quantity or amount of the subject-matter.*—

Where the sale is by metes and bounds, or in any other analogous manner by which the particular subject-matter is identified, and the purchaser receives the very parcel which he intended to buy, and there has been no misleading conduct on the vendor's part, a deficiency in the supposed amount will not prevent an enforcement of the contract, unless it should be so very great as to destroy or defeat the whole object of the purchase, and render the agreement a virtual nullity. It may, perhaps, entitle the purchaser to some abatement from the price, but this only in exceptional cases, where there was a clear mistake.(2) But if the vendor misrepresents or misstates the amount of the land, whether the price be estimated at so much per acre or

one time, and was entire, except that each lot was valued separately in a list annexed to the agreement. Title failed as to five (5), and this was held to constitute no defense to the vendor's enforcing a specific performance in respect to the others. TILGHMAN, C. J., said: "It has been contended that the contract was so entire as to be incapable of division, and that a failure as to part dissolved the contract in the whole. It strikes me very differently. There are cases when failure of title to part ought to dissolve the whole contract, because that part may be so essential that the loss of it would render the residue of little value. Such would be the case of the loss of a mine, or of a valuable fishery, attached to a parcel of poor land. Such, also, might be the case of a loss of a parcel of meadow or woodland, or of the right of water necessary for the turning of a mill. The principle is this, that when the part lost appears to be so essential to the residue that it cannot reasonably be supposed the purchase would have been made without it, the contract is dissolved *in toto*. [Note.—These general remarks must be taken in connection with the facts of the cases. If applied to a contract for one entire tract, they would be misleading, as restricting too much the power of the vendee to refuse to perform.] But what is the case under consideration? The loss of five lots not adjoining, or particularly connected with the others. There was no evidence of their being in any way essential to the use or full enjoyment of the residue; and as the price at which each of the lots was estimated in the contract was proved on the trial, there could have been no difficulty in making a proper deduction."

(1) *Casamajor v. Strode*, 2 My. & K. 724; *Lewin v. Guest*, 1 Russ. 325; *Osborne v. Bremar*, 1 Dessaus. 486; *White v. Dobson*, 17 Gratt. 262; *Stoddart v. Smith*, 5 Bin. 355.

(2) See *Kent v. Carcaud*, 17 Md. 291; *Foley v. McKeown*, 4 Leigh, 627.

not, the vendee is entitled to compensation for the deficiency.(1) Where the amount of the land is said to be "or of about" so many acres, or as containing so many acres, or such and such an amount, "be the same more or less," or with words to that effect, and the vendor has not knowingly misled the purchaser, the rule is different in the two cases of an executed and an executory contract. If the sale has been consummated by a conveyance, a deficiency in the amount stated, even if considerable, does not, as it appears, entitle the grantee to any relief by way of abatement.(2) If, however, the contract remains unexecuted—i. e., as a mere contract—the vendee can have a proportionate abatement, unless the deficiency is very small.(3) These cases assume that the vendor has been wholly free from any inequitable conduct. But if he knew the real quantity, and therefore that the amount stated was incorrect, the addition of any such limiting or comprehensive clauses will not remove his liability to make a proper abatement from the stipulated price.(4) A very large deficiency, where the vendee has not been negligent, and cannot be supposed to be acquainted with the real facts, will entitle him to a compensation, even in the face of an express provision cutting off his claim to an allowance. Land was sold at auction described as containing 753 square yards or thereabouts, and one provision of the contract stipulated that if any error, misstatement, or omission in the description should be discovered, it should not annul the sale, nor should any compensation be allowed. The land was found to contain only 573 square yards. Held, that the stipulation applied only to small errors, and did not cover such a large deficit, and the purchaser

(1) *Sir Cloudesley Shovel v. Bogan*, 2 Eq. Cas. Abr. 688, pl. 4; *Hill v. Buckley*, 17 Ves. 394; *In re Gore's Estate*, 3 Ir. Eq. Rep. 260; *Stockton v. Union Oil Co.*, 4 W. Va. 273, a sale of 2,000 acres at \$25 per acre; a deficiency of 39 acres, held, entitled vendee to an abatement according to the price (\$25) per acre; and see *Howard v. Kimball*, 65 N. C. 175.

(2) *Troyford v. Wareup*, Rep. Temp. Finch, 310; *Anon.*, 2 Freem. Ch. 106; *Lord Townshend v. Stangroom*, 6 Ves. 328.

(3) *Hill v. Buckley*, 17 Ves. 394; *Portman v. Mill*, 2 Russ. 570; *Day v. Fynn*, Owen, 133; *In re Egan's Estate*, 6 Ir. Jur. (N. S.) 90; *In re Browne's Estate*, 5 Ir. Jur. (N. S.) 185. But in *Winch v. Winchester*, 1 V. & B. 375, the land being described as containing by *estimation* 41 acres, be the same more or less, there was a deficiency of five acres and a fraction. *Sir Wm. Grant, M. R.*, held the vendee not entitled to any deduction.

(4) *Winch v. Winchester*, 1 V. & B. 375, 773; *Duke of Norfolk v. Worthy*, 1 Camp Ca. 337. In *King v. Knapp*, 59 N. Y. 462, the vendor did not disclose a material defect within his knowledge, and this was held to defeat his right to enforce performance upon the vendee, although the description contained the words "more or less."

was entitled to an abatement.(1) And it will not be inferred that the vendee had notice or knowledge of the real amount or true measurement of the land in question, so as to cut off his right to a compensation for a deficiency, because he was familiar with the property, or even because he had been or was an occupant of it.(2) Where the amount of the land is much greater than that described in the contract, and there is a stipulation for compensation in the event of a misdescription, the vendee can compel a conveyance of the whole by paying the compensation, but the vendor cannot compel the purchaser to perform by accepting the whole and paying an enhanced price by way of compensation, for the misdescription is the vendor's own act.(3)

SEC. 353. According to the English chancery practice in suits for specific performance, objections to the title may be raised by the vendee for the first time on the inquiry as to title after the decree, unless a provision is inserted in the decree expressly cutting off or limiting the defendant. If the vendor wishes to prevent objections which have been waived or passed over in silence from being thus raised on the inquiry concerning title, he should ask at the hearing for the insertion of a direction to that effect in the decree. When the decree directs in general terms an inquiry as to the title, it means a good title *having regard to the terms of the contract*.(4)

SEC. 354. *Affirmative acts of the plaintiff in violation of the contract*.—If the plaintiff's simple negative conduct, his neglect to do what he has undertaken to do, is sufficient to prevent his obtaining the remedy of specific performance, much more does the same result follow from his affirmative acts which are in direct violation of the contract. These acts may furnish a ground for rescinding the contract, or, in other words, for his forfeiting all rights under it; or they may constitute a personal objection to the plaintiff, and to his obtaining any benefit

(1) *Whittemore v. Whittemore*, L. R. 8 Eq. 603, per MALINS, V. C. The defendant cited, in support of his contention concerning the stipulation, *Portman v. Mill*, 2 Russ. 570; *Dimmock v. Hallett*, L. R. 2 Ch. 21; *Cordingley v. Cheesebrough*, 3 Giff. 496; 31 L. J. Ch. 617. See, also, as to a partial failure of the subject-matter through mistake or otherwise, *Jeffrys v. Fairs*, L. R. 4 Ch. D. 448; *Denny v. Hancock*, L. R. 6 Ch. 1.

(2) *Winch v. Winchester*, 1 V. & B. 375; *King v. Wilson*, 6 Beav. 124; where a tenant in possession bought the lot which was described as 46 feet in depth, but was found to be only 33 feet deep, and he was held entitled to an abatement.

(3) *Price v. North*, 2 Y. & C. Ex. 620.

(4) *Upperton v. Nickolson*, L. R. 6 Ch. 436. According to the English chancery practice in vendor's suits, the ordinary decree for the plaintiff directs a performance by the defendant in case a good title is shown; and the decree is then followed by an inquiry before a master in respect to the state of the vendor's title.

from the agreement which he has thus violated. In the former of these cases, it would be useless and absurd to grant a specific performance to the plaintiff, when he would at once forfeit and lose all that he obtained. The second case is controlled by the general doctrine already discussed, that the plaintiff must perform all the terms on his part, and that the party coming into a court of equity for its relief must himself do equity.(1)

SEC. 355. The doctrine is well illustrated by cases upon agreements for leases. Whenever the intended lessee, under such agreement, does or has done acts, or made omissions in reference to the land which would work a forfeiture of the lease if it had been executed, namely, if he does, or omits acts which would amount to a breach of a condition to be inserted in the instrument, and for which breach the lessor would have a right of re-entry, or if he commits waste, or uses the land, when it is agricultural, in an unhusband-like manner, he cannot enforce a specific performance of the agreement against the lessor.(2) It should be carefully remembered, however, in applying this doctrine, that the rules concerning waste and the use of agricultural land in an unhusband-like manner, are not so strict in this country as in England, and are much more governed by circumstances, and the customary modes of using land in the neighborhood. It has been held, also, that the breach by the intended lessee of a covenant to repair will prevent him from obtaining the remedy.(3) Even though the lease, when executed, would contain no conditions; or, in other words, the covenants were not to be accompanied by a clause of re-entry, so that their breach would not work an absolute forfeiture, still the acts of the intended lessee, which, if the instrument had been executed, would have amounted to a breach of the covenants, may be a sufficient ground for defeating his claim to a specific performance, because, although there might be no forfeiture, he would have violated the principle that a person seeking the aid of equity must himself do equity—must act in accordance with equity.(4)

(1) *Knatchbull v. Grueber*, 3 Meriv. 142, and *Boardman v. Mostyn*, 6 Ves. 472, per Lord ELDON; *Lewis v. Bond*, 18 Beav. 87, per Sir J. ROMILLY, M. R.; *Gregory v. Wilson*, 9 Hare, 687, per TURNER, V. C.; *Walker v. Jeffreys*, 1 Hare, 341.

(2) *Hill v. Barclay*, 18 Ves. 63, per Lord ELDON; *Lewis v. Bond*, 18 Beav. 85; *Gregory v. Wilson*, 9 Hare, 683.

(3) *Nunn v. Truscott*, 3 DeG. & Sm. 304; *Job v. Banister*, 39 Eng. Law & Eq. 599.

(4) *Duke of Somerset v. Gourlay*, 1 V. & B. 73, per Lord ELDON. In *Thompson v. Guyon*, 5 Sim. 65, a lease had been given with a clause for re-entry upon a breach of any covenants by the lessee, and also a covenant to grant a further

SEC. 356. Where, in a suit by an intended lessee to compel an execution of the lease, the lessor sets up in defense acts of the plaintiff which would amount to a breach of some condition to be contained in the instrument, and would work a forfeiture, and would, therefore, according to the rule stated above, prevent a specific performance, it is left fairly doubtful from the evidence of both parties whether the plaintiff has been guilty of such acts or omissions, the recent English cases have established the rule that the court will decree an execution of the lease, but will direct it to be ante-dated the time of the alleged breaches, and will compel the plaintiff to admit, in any action at law brought against him on the lease for such breaches, that the instrument was executed at the date which it bears. In this manner the question of forfeiture is left, where it more properly belongs, to a court of law.(1)

SEC. 357. In other contracts than agreements for leases, if the plaintiff, pending the agreement or during the negotiations arising out of it, does acts of wrong or violence or injustice toward the defendant, or is guilty of inequitable and harsh conduct, violating the entire spirit and intent, even if not the letter of the contract, he will thereby preclude himself from obtaining the aid of a court of equity in a subsequent specific enforcement against an unwilling defendant, who sets up the wrong as a defense.(2).

term at the end of the original term, if it should not have been sooner ended by the lessee's acts or defaults. The lessee paid all the rent and remained in possession till the expiration of the term, and then claimed the renewal. He had, however, committed various breaches of his covenants during the term of which the lessor had no knowledge until after the lease had expired. The lessee, suing for a specific performance of the lessor's covenant to renew, the lessor set up these breaches as a defense, and the court held that the lessees could not enforce a specific performance, because the lessor could have re-entered and ended the lease during the term if he had known of the breach, and he ought not to be put in a worse position after the end of the term, than he would have been if he had known of the breaches during its continuance. See, also, *Gorton v. Smart*, 1 S. & S. 63, in which it was intimated that a nuisance committed by the intended lessee upon other land of the lessor, might prevent his enforcing an execution of the contract to give a lease.

(1) *Pain v. Coombs*, 1 DeG. & J. 34; *Lillie v. Legh*, 3 DeG. & J. 204; *Rankin v. Lay*, 2 DeG. F. & J. 65. 72; *Noonan v. Orton*, 21 Wis. 283.

(2) For a very illustrative case, see *Marble Co. v. Ripley*, 10 Wall. 359 (for facts and opinion, see *ante*, § 35, note); *Knatchbull v. Grueber*, 1 Mad. 153; 3 Meriv. 124. An estate was sold upon condition, amongst others, that possession should be given immediately, and this was done. Disputes afterwards arose between the parties about the title, and the vendors therefore tendered the vendee his deposits, demanded back the possession, drove his stock off from the land, and notified the tenants not to pay their rent to him; and this conduct was held so



SEC. 358. There are, however, limitations upon or exceptions to the doctrine, as follows: The plaintiff's acts in violation of the contract will not absolutely defeat his equitable remedy of specific performance, when they are not willful or intentional ;(1) nor when they consist in breaches of covenant so slight and unimportant that equity would relieve the party from the legal forfeiture caused by them ;(2) nor when, though intentional, these wrongful acts are of very little consequence, and the defendant has a full and sufficient remedy for them, while the plaintiff would be without any adequate remedy on the contract, unless a specific performance is granted to him. But in this last case the court will show its sense of the plaintiff's conduct by imposing, perhaps, some terms or conditions, such as withholding his costs, or even charging him with the costs.(3)

SEC. 359. The fact that the defendant — the lessor or vendor — has waived all claim or right of remedy at law for the plaintiff's wrongful acts, does not debar him from setting the same up in equity as a defense to plaintiff's suit for specific performance, because even though the acts do not create a forfeiture, they may furnish a sufficient personal objection to the plaintiff.(4) If, however, the plaintiff's conduct is not relied on as raising such an objection, but as constituting a breach of promise, and as thereby working a forfeiture of his right and interest, it must be proved very clearly that his wrongful acts have produced a forfeiture. By denying a specific performance, the court of equity cuts off all power of trying the question of forfeiture at law, and this it will not do unless the proof is such as establishes

inconsistent with the contract that the vendors were not able to enforce performance. The following are further illustrations of wrongful acts by the plaintiff, different from or in addition to the mere default of non-performance, which have prevented a decree in his favor: Using undue influence, *Brady's Appeal*, 66 Pa. St. 277; *Chambers v. Livermore*, 15 Mich. 381; *Piersol v. Neill*, 63 Pa. St. 429; the vendor of an undivided share so acting towards his co-tenant as to prevent the vendee from obtaining peaceable possession, *Dech's Appeal*, 57 Pa. St. 467; repudiating the contract, *Eastman v. Plumer*, 46 N. H. 464; refusing to pay what he was in good faith bound to pay, *McClellan v. Darrah*, 50 Ill. 249; wrongful refusing, or neglecting to perform stipulations on his part, *Howe v. Conley*, 16 Gray 552; *Thorp v. Pettit*, 1 C. E. Green, 488; *Board of Supervisors v. Henneberry*, 41 Ill. 179; *Cox v. Boyd*, 38 Ala. 42.

(1) *Walker v. Jeffreys*, 1 Hare, 341, where the violation was caused by inevitable accident.

(2) *Walker v. Jeffreys*, 1 Hare, 341; *Pain v. Coombs*, 3 Sm. & Gif. 449; *Gregory v. Wilson*, 9 Hare, 683.

(3) *Holmes v. Eastern Counties Ry. Co.*, 3 Jur. (N. S.) 737, per PAGE WOOD, V. C.

(4) *Boardman v. Mostyn*, 6 Ves. 437.

the fact beyond a question.(1) Where the evidence leaves the question in any doubt, the court, as we have already seen, grants a specific performance, but leaves a way open for the defendant to try the issue by a legal action.(2)

SEC. 360. *Tender, when necessary.*—In connection with the general doctrine that the party seeking a specific enforcement must perform, or be ready and willing to perform on his part an entirely distinct question, remains to be considered. Must the party asking a specific enforcement aver and prove an actual tender or offer of performance prior to the commencement of the suit, as a prerequisite to his obtaining the relief; or is it sufficient for him to show simply that he has been, or is ready and willing to perform, and that he makes an offer in his pleading to perform all the acts demanded from him by the contract? It is an established rule of the law, that when one party sues, in a legal action, upon a contract in which the covenants or stipulations are mutual and dependent, he must allege and prove an actual tender or offer of performance by himself. Such actual tender or offer is a condition precedent to his maintaining an action at law for the breach of such a contract.(3) In some of the states this legal rule seems to be applied in all its strictness to suits for the specific enforcement of contracts; in other states the more liberal rule of equity has been adopted.

SEC. 361. Two general doctrines, however, may be considered as established with reference to the equitable action. An actual tender by the plaintiff before suit brought is unnecessary, when, from the acts of the defendant or from the situation of the property, it would be wholly nugatory—a mere useless form. If, therefore, before or at the time of completion, the defendant has openly and avowedly refused to perform his part, or declared his intention not to perform at all events, then the plaintiff need not make a tender or demand of performance before bringing his suit; it is enough that he is ready

(1) *Gregory v. Wilson*, 9 Hare, 691, per TURNER, V. C.; *Mundy v. Jolliffe*, 5 My. & Cr. 167, 177, reversing 9 Sim. 413.

(2) See cases *ante*, § 356.

(3) *Johnson v. Wygant*, 11 Wend. 48; *Lester v. Jewett*, 11 N. Y. 443; and the vendee must demand a deed from the vendor. *Fuller v. Hubbard*, 6 Cow. 13; *Fuller v. Williams*, 7 Cow. 53; *Hackett v. Huson*, 3 Wend. 250; *Carpenter v. Brown*, 6 Barb. 147; *Hill v. Hobart*, 16 Me. 164; *Fairbanks v. Dow*, 6 N. H. 266; *Tinney v. Ashley*, 15 Pick. 546; *Smith v. Robinson*, 11 Ala. 840; *Kinkead v. Shreve*, 17 Cal. 275; *Gray v. Dougherty*, 25 Cal. 266, 278, 279; *Beecher v. Conradt*, 13 N. Y. 108.

and willing, and offers to perform in his pleading.(1) Also, if at the time fixed in the contract for completion the vendor is unable to fulfill and to convey as he had stipulated, by reason of some defect in his title, or of some incumbrance on the land, the vendee is in like manner excused from making an actual tender of the price, or of the securities which he was to give prior to the commencement of his suit, unless, according to the doctrine of some cases, time was of the essence of the contract.(2) The second proposition is, that where the stipulations are mutual and dependent—that is, where the deed is to be delivered upon the payment of the price, either on a day named or without any day being specified, an actual tender and demand by one party is absolutely necessary to put the other in default, and to cut off his right to treat the agreement as still subsisting. So long as neither party makes such tender—of the deed by the vendor and of the price or securities by the vendee—neither party is in default; the contract remains in force, and either party may make a proper tender or offer and sue, until barred by the statute of limitations.(3) This rule, however, does not apply to those contracts in which the time of performance has been made essential, and the agreement itself is to be regarded as void or rescinded if the vendee fails to make his payments on the stipulated days. I now proceed to inquire directly when a tender by the plaintiff, before suit brought, is necessary.

SEC. 362. *Where time is essential.*—In all those contracts where the time of payment by the vendee is essential and not simply material, and *a fortiori* in those where, if the vendee's payments are not made upon the exact day named, the vendor may treat the agreement as at

(1) *Kerr v. Purdy*, 50 Barb. 24; *Crary v. Smith*, 2 N. Y. 60, 65; *White v. Dobson*, 17 Gratt. 262; *Brown v. Eaton*, 21 Minn. 409, 411; *Gill v. Newell*, 13 Minn. 462, 472; *Duchman v. Duchman*, 49 Mo. 107; *Brock v. Hidy*, 13 Ohio St. 307, 310; *Hunter v. Daniel*, 4 Hare, 420, 433; *Gray v. Dougherty*, 25 Cal. 266, 280, 281; *Maxwell v. Pettinger*, 2 Green's Ch. 156; *Mallocks v. Young*, 66 Me. 459, 467.

(2) *Karker v. Haverly*, 50 Barb. 79; *Delavan v. Duncan*, 49 N. Y. 485, 487; *Young v. Daniel*, 2 Iowa, 126; *Gray v. Dougherty*, 25 Cal. 266, 280; and see for facts excusing a tender by the vendee, *Hall v. Whittier*, 10 R. I. 530. In *Kimball v. Tooke*, 70 Ill. 553, it was held that where time is of the essence of the contract, the vendee must tender the price on the day named, even though an incumbrance on the land would prevent the vendor from completing on that day.

(3) *Leaird v. Smith*, 44 N. Y. 618; *Van Campen v. Knight*, 63 Barb. 205; *Crabtree v. Levings*, 53 Ill. 526; *Irvin v. Blackley*, 67 Pa. St. 24, 28; *Hubbell v. Van Schoening*, 49 N. Y. 321, 331, "the party seeking to put the other in default must not only be ready and willing to perform, but he must tender performance at the time, and demand performance from the other."

an end, the vendee must make an actual tender of the price and a demand of the deed at the specified time, as a condition precedent to his maintaining a suit. The same is true of the vendor when the time of his conveyance is made essential. This rule is involved in the very notion of time being of the essence of the contract.(1) The necessity of a tender on the exact day may, however, be waived by the conduct of the other party even in this class of contracts.(2)

SEC. 363. *Where time is not essential.*—With respect to the necessity of an actual tender by the plaintiff, before suit brought for a specific performance of contracts in which time is not essential, there is a direct conflict among the American decisions, and in the rules prevailing in different states. According to a large number of decisions, and as the rule seems to be settled in several of the states, where the stipulations of the contract are mutually dependent, the plaintiff must make an actual tender, and must demand a performance by defendant before bringing his suit for a specific enforcement; unless the defendant's conduct has amounted to a waiver, so as to let in the rule stated in section 361. Under the operation of this doctrine, a tender and demand are, in general, as much a necessary prerequisite to the equitable suit for a specific performance as to the legal action brought for a breach of the contract. A modification, however, is made by some of the cases belonging to this class, which dispense with the demand of performance in the equity suit, and only require the tender.(3) A very different rule has been established for the equi-

(1) *Kimball v. Tooke*, 70 Ill. 553; *Phelps v. Ill. Cent. R. R.*, 63 Ill. 468; *Gale v. Archer*, 42 Barb. 320; *Wells v. Smith*, 2 Edw. Ch. 78; *Duffy v. O'Donovan*, 46 N. Y. 223, in which a short delay of the vendee was excused by acts of the vendor. *Heuer v. Rutkowsky*, 18 Mo. 216; and see cases cited under §§ 383-394.

(2) *Duffy v. O'Donovan*, 46 N. Y. 223; *Kimball v. Tooke*, 70 Ill. 553; for recent cases involving the general question of a waiver of timely performance, see *De Wolf v. Pratt*, 42 Ill. 198; *Hoyt v. Tuxbury*, 70 Ill. 331; *Walker v. Douglass*, 70 Ill. 445; *Iglehart v. Vail*, 73 Ill. 63; *Ditto v. Harding*, 73 Ill. 117; *Hedenberg v. Jones*, 73 Ill. 149; *Tobey v. Foreman*, 79 Ill. 489.

(3) *Suits by the vendee.* This rule is well settled in Mississippi. *Klyce v. Brayles*, 37 Miss. 524, and cases cited; *Mhoon v. Wilkerson*, 47 Miss. 633. The following cases either expressly hold or impliedly assume the necessity of a tender and demand, or of a tender alone, as stated in the text. *Hoen v. Simmons*, 1 Cal. 119, 121; *Goodale v. West*, 5 Cal. 339, 341; *Green v. Covilland*, 10 Cal. 317, 323; *Gaven v. Hagen*, 15 Cal. 208, 212; *Duff v. Fisher*, 15 Cal. 375, 381; *Morgan v. Stearns*, 40 Cal. 434, 438 (action at law); *Englander v. Rogers*, 41 Cal. 420 (action at law); *Marshall v. Caldwell*, 41 Cal. 611, 615; *Jones v. City of Petaluma*, 36 Cal. 230, 232; *Gray v. Dougherty*, 25 Cal. 266, 278, 282 (in the two latter cases a demand of the deed by the vendee was held unnecessary in the equitable suit, but requisite in a legal action); *Mather v. Scoles*, 35 Ind. 1; *Fall v. Hazelrigg*,

table suit by another class of decisions. It is as follows: In a suit for a specific performance, where the stipulations of the agreement are mutual and dependent, an actual tender or demand by the plaintiff prior to the suit is not essential to his obtaining the relief. It is enough that he was ready and willing, and offered at the time specified, or even that he is ready and willing at the time of bringing the suit, unless his rights have been lost by *laches*, and that he offers in his pleading to perform all the stipulated acts on his part. The plaintiff's performance will be provided for in the decree as a condition to his relief, and his neglect to make a prior tender or specific offer to pay the price to deliver the securities, or to execute a deed, as the case may be, will only affect his right to costs in the suit.(1)

45 Ind. 576; *Hunter v. Bales*, 24 Ind. 299, 303; *Lynch v. Jennings*, 43 Ind. 276, 286 (in the three latter cases the vendee had actually tendered before suit, and an offer to pay made in his complaint was held sufficient, without bringing the money into court); *Hart v. McClellan*, 41 Ala. 251; *Carter v. Thompson*, 41 Ala. 375; *Bell v. Thompson*, 34 Ala. 633; *Hall v. Whittier*, 10 R. I. 530 (a tender was held excused by defendant's conduct, but this case plainly shows that otherwise it would have been necessary); *Duchman v. Duchman*, 49 Mo. 107 ("ordinarily such tender or offer to pay is essential"); *Brock v. Hidy*, 13 Ohio St. 306, 310 ("it is a familiar general rule of equity, that a vendee seeking a specific performance of a contract for a conveyance of real estate by a vendor must tender or bring into court the purchase-money"); *Young v. Daniels*, 2 Iowa, 176; *Huff v. Jennings*, 1 Morris (Ia.) 434; *Collins v. Vanderveer*, 1 Iowa, 573, 578; *Rogers v. Taylor*, 40 Iowa, 193; *Greenup v. Strong*, 1 Bibb 590; *Beardon v. Wood*, 1 A. K. Marsh. 450. *Suits by the vendor*—*Klyce v. Brayles*, 37 Miss. 524, and cases cited; *Mhoon v. Wilkerson*, 47 Miss. 633; *Ex parte Hodges*, 24 Ark. 197; *Hill v. Grigsby*, 35 Cal. 656 (action at law); *Corbus v. Teed*, 69 Ill. 205 (where the vendee has assigned the contract, a tender by the vendor should be made to the original vendee). In *Thompson v. Smith*, 63 N. Y. 301, where the vendor had died, and his executor sued, since they did not hold the title and could not give a deed, and since a decree ordering them to convey would not bind the vendor's heirs or devisees, it was held that the complaint must show that they had procured a deed from the heirs or devisees and tendered it, or that they were ready, willing, and able to procure and deliver such deed.

(1) *Suits by the vendee*. *Smoot v. Rea*, 19 Md. 398, 410; *Maughlin v. Perry*, 35 Md. 352; *Morris v. Hoyt*, 11 Mich. 9, 18 (in this case the contract could be avoided by the vendor on any failure of the vendee to pay at the day named, and yet the equitable rule dispensing with tender was applied); *Seeley v. Howard*, 13 Wisc. 336; *St. Paul's Division v. Brown*, 9 Minn. 157; *Chess's Appeal*, 4 Pa. St. 52; *Irvin v. Gregory*, 13 Gray, 215, 218 (SHAW, C. J., said: "In such cases [of dependent stipulations] it is not necessary on the part of the vendee to make a strict tender, and actually to deliver over the money unconditionally without his deed; it is sufficient that upon reasonable notice to the owner he is ready and willing to perform, and when the performance is the payment of money, that he has the money and is able and prepared to pay, and demands the deed, and the other refuses to receive the money and execute the deed. That is a sufficient tender

It is plain that the distinction between the doctrine of equity and of the law with respect to tender, has been overlooked or intentionally disregarded by the courts in several of the states.

SEC. 364. *Form of the deed.*—What kind and form of deed the vendor must execute and deliver—whether quit-claim, grant with or without covenants, warranty, etc.—will in numerous instances be determined by the special language of the contract itself. But certain rules have been settled with reference to some general clauses of agreements in frequent use, which I shall state very briefly. It should be observed, however, that the great majority of the decisions from which these rules are gathered were rendered in legal actions, where the question to be determined was, whether the vendor's covenant to convey had been broken at law or not. It is settled by a strong preponderance of authority that a general covenant or contract "to convey," or to "sell and convey" certain land, or to "convey" certain land "by a good and sufficient deed," or in any other analogous terms, binds the vendor to convey a perfect, indefeasible title irrespective of the form of the deed, and is not satisfied by giving a deed merely sufficient in form to convey what partial interest the vendor may have, even though it contain all covenants of title. In other words, the vendor

of performance to warrant the party so offering to maintain his action. \* \* \* In a suit for a specific performance, it is sufficient for the plaintiff to offer, by his bill, to bring in his money when the sum is liquidated, and he has a decree for a specific performance)." *Park v. Johnson*, 4 Allen, 259; *Stevenson v. Maxwell*, 2 N. Y. 493, 515 (per GARDINER, J.: "When the deed is to be given and the purchase-money is to be paid on a particular day, neither could sue at law without a tender of the deed by the one party, or of the purchase-money or security by the other. Either party might, however, go into equity for a specific performance, and make the offer incumbent upon him in the bill, and the failure to make a tender before the commencement of the suit, would affect the question of costs)." *Bellinger v. Kitts*, 6 Barb. 273, 281; *Bruce v. Tilson*, 25 N. Y. 194, 197, 203 (see comments of ALLEN, J., upon *Wells v. Smith*, 2 Edw. Ch. 78; 7 Paige, 22, confining it to contracts in which time is essential); *Treeson v. Bissell*, 63 N. Y. 168, 170; *Thompson v. Smith*, 63 N. Y. 301, 304. Where a tender has actually been made by the vendee, an offer to pay contained in his complaint is sufficient, he need bring the money into court. So held in *Fall v. Hazehrigg*, 45 Ind. 576; *Hunter v. Bales*, 24 Ind. 299, 303; *Lynch v. Jennings*, 43 Ind. 276, 286; and see *Mix v. Booth*, 46 Ill. 311. *Suits by the vendor*—Tender of a deed not necessary. *Stevenson v. Maxwell* 2 N. Y. 498, 515; *Bruce v. Tilson*, 55 N. Y. 194, 197, 203; *Treeson v. Bissell*, 63 N. Y. 168, 170; *Thompson v. Smith*, 301, 304 (but where the vendor has died, and his executors or administrators sue, they must procure and tender a deed from the vendor's heirs or devisees); *Halok v. Greensweig*, 2 Pa. St. 295; *Winton v. Sherman*, 20 Iowa, 295; *Rutherford v. Haven*, 11 Iowa, 507; *Woodson v. Scott*, 1 Dana, 470; *Seeley v. Howard*, 13 Wisc. 336; and see *McKleroy v. Tulane*, 34 Ala. 78.

must give a perfect title at all events, and must execute a deed sufficient to transfer and secure such title.(1) The contrary construction at law is put upon such covenants by some of the cases which hold that they are satisfied by the delivery of a deed sufficient in form to convey whatever title the vendor has without covenants of warranty.(2) It is further held in some of the decisions that a contract in general terms to convey specified land, but silent as to the kind of deed, obliges the vendor to give a deed with covenant of warranty, either general or special, and conveying an estate fee in fee simple; but the requirement of a warranty in the completion of such agreements is by no means universal.(3) The construction which has been put upon a few other special contracts is stated in the foot-note.(4)

SEC. 365. *Second. Some rules for interpreting usual provisions in contracts.*—In England certain methods of conducting a sale, and certain features of the contract have become quite generally established by common usage. The property which is put up for sale, either at private negotiation or at public auction, is frequently if not commonly described, with its amount, situation, estate, title, incumbrances, and the like items, which go to make up a description, in a preliminary

(1) *Burwell v. Jackson*, 9 N. Y. 535, and cases cited, expressly overruling *Gazley v. Price*, 16 Johns. 267, and *Packer v. Parmelee*, 20 Johns. 130; *Delavan v. Duncan*, 49 N. Y. 485; *Story v. Conger*, 36 N. Y. 673; *Clute v. Robinson*, 2 Johns. 395; *Matter of Hunter*, 1 Edw. Ch. 1; *Porter v. Noyes*, 2 Greenl. 22; *Brown v. Gammen*, 14 Me. 276; *Stow v. Stevens*, 7 Vt. 27; *Abendroth v. Greenwich*, 29 Conn. 356; *Owings v. Baldwin*, 8 Gill, 337; *Clark v. Redman*, 1 Blackf. 380; *Panker v. McAllister*, 14 Ind. 12; *Shreck v. Piera*, 8 Iowa, 350; *Taft v. Kessel*, 16 Wisc. 273; *Greenwood v. Ligon*, 10 Sm. & Mar. 615. This ruling is identical with the equity doctrine that the vendor must give a good title unless the contract otherwise provides.

(2) *Gazley v. Price*, 16 Johns. 267; *Parker v. Parmelee*, 20 Johns. 130 (these cases are overruled by *Burwell v. Jackson*, 9 N. Y. 535); *Timney v. Ashley*, 15 Pick. 546; *Joslyn v. Taylor*, 33 Vt. 470; *Brown v. Covilland*, 6 Cal. 566, 573; *Green v. Covilland*, 10 Cal. 317, 322; and see *Clark v. Lyons*, 25 Ill. 105.

(3) *Goddin v. Vaughn*, 14 Gratt. 102; *Vardeman v. Lawson*, 17 Tex. 10; *Holman v. Creswell*, 15 Tex. 394; *Witter v. Biscoe*, 13 Ark. 422; *Tremain v. Lining*, *Wright* (Ohio) 644; *Lloyd v. Farrell*, 48 Pa. St. 73; *per contra*, see *Ketchum v. Evertson*, 13 Johns. 359.

(4) A covenant to "sell and convey" land does not bind the vendor to give a deed with covenants of warranty, or other personal covenants. *Van Epps v. Schenectady*, 12 Johns. 436. A covenant to "convey in fee simple" is satisfied by a deed without covenant of warranty, if the vendor has such an estate. *Fuller v. Hubbard*, 6 Cow. 1. A covenant to convey, by a "good and sufficient deed of general warranty," does not require that the land should be free from incumbrances or wife's dower. *Bostwick v. Williams*, 36 Ill. 65; *per contra*, it requires a deed with release of dower. *Davar v. Cardwell*, 27 Ind. 478.

written or printed document called the "Particulars of Sale." The terms upon which the sale is made, and the restrictions and limitations upon the buyer, are stated in another preliminary document known as "The Conditions of Sale." This contains, among other things, the price, the mode and time of payment, the mode and time of delivering possession and completing the transaction, all the special restrictions imposed by the vendor with reference to the title which the purchaser must be contented with, and the vendor is able or willing to make out, and whatever other limitations and rules of proceeding the owner sees fit to prescribe for the government of the parties in the process of arranging and performing the contract. Several of these stipulations, which are usually found in such documents, have already been discussed, and their effect ascertained; and others will be examined in the following sections upon "Time" and "Compensation." The general rules for the construction and interpretation of these parts of the contract, have been well settled by the English courts; and although no such practice has been universally established in this country—chiefly because our titles and the law governing them are so much more simple, certain, easy and natural—and although there is with us a great diversity in the forms and contents of contracts for the sale of land, yet the doctrines and principles of construction which have been settled in England, must, of necessity, be applicable to all similar or analogous contracts, stipulations and clauses which may be used in the United States. Our agreements may be more simple, less formal and elaborate, and yet the same questions in kind must arise in their interpretation which arise from the more complicated forms which prevail in Great Britain. Although the English decisions may refer to technical names little used and hardly known in the real estate transactions of this country, such as "Particulars," "Conditions," and the like, yet the principles of these decisions are as true with us as with them, and can be readily applied to the cases arising in our own courts upon the contracts with which we are familiar. I shall give, therefore, a brief abstract of the general rules of construction as settled by the English authorities, but the interpretation of special provisions will be found under the appropriate heads to which they belong.

SEC. 366. In construing particular contracts, and in deducing general rules of interpretation, the courts have constantly recognized two facts, or elementary truths, as the very foundations of their judicial processes—facts which are as true in the United States as in England. They are: 1. The vendor has, or must be assumed to have, a knowl-



edge of all the facts and circumstances concerning the property to be sold, and his title therein, rather than the purchaser; and 2. The vendee, in the absence of all express stipulations to the contrary, possesses a legal right to have the very property contracted for, with a good title and without incumbrance, so that all contrary stipulations and conditions—that is, which would confine him to the acceptance of an imperfect title, or incumbered or diminished property, are in restraint of his common-law right. These two foundation principles are inherent in the relations of the parties and the nature of the subject-matter.

SEC. 367. The first and most important rule, derived from these premises, is that the particulars and conditions—or in other words, all parts of the contract wherein the vendor describes the property, his estate and title, or imposes restrictions upon the vendee's common-law right, are construed strictly as against the vendor, and liberally in favor of the purchaser. In other words, the vendor must, in all these portions of the contract, use language the meaning of which is reasonably clear and certain; and *a fortiori* must do so when the property is sold at auction, where the bidders do not generally have time or opportunity for a careful examination of the terms.(1) Whenever, therefore, the language on the vendor's part is ambiguous, fairly susceptible of different meanings, the duty and risk do not fall upon the purchaser of ascertaining and fixing upon the correct meaning as intended;(2) he may adopt the meaning most favorable to himself.(3)

(1) *Gibson v. D'Este*, 2 Y. & C. C. C. 542, 558, 559; *Dykes v. Blake*, 4 Bing. N. C. 463, 476.

(2) *Martin v. Cotter*, 3 Jon. & Lat. 496; *Greaves v. Wilson*, 4 Jur. (N. S.) 271.

(3) *Seaton v. Mapp*, 2 Coll. C. C. 556. The court will hesitate to compel a purchaser, under such cases, to complete the performance, if the language is ambiguous, and he is unwilling to accept the vendor's construction. *Taylor v. Martindale*, 1 Y. & C. C. C. 658. This rule of construction favorable to the vendee, where the vendor's language is fairly ambiguous, is illustrated by the following cases among many: *Seaton v. Mapp*, 2 Coll. C. C. 556, it being doubtful to which of two leases reference was made by the vendor's language, the vendee's construction was adopted, and the vendor's suit was dismissed. In *Rhodes v. Ibbetson*, 4 DeG. M. & G. 787, a condition that no title should be required prior to a certain lease, was held not to be so clear and express as to prevent an investigation into the proceedings with respect to the contract for the lease which had taken place before the lease itself was executed; in *Drysdale v. Mace*, 2 Sm. & Gif. 225; 5 DeG. M. & G. 103, the vendor of a reversionary estate stipulated as a condition of the sale, that a statement in a deed of 1836, that a "life" annuity had not been paid for eight years, and a declaration by the vendor that no claim had been made upon him in respect to such annuity since 1841, and that he believed no such claim had been made for the past twenty years, should be conclusive evi-

SEC. 368. It follows, as a necessary corollary from this rule of strict construction against the vendor, that the language of one condition or restrictive clause inserted by the vendor, will not be extended by implication so as to embrace another condition or restrictive clause, and thus make it more restrictive or enlarge its scope and application beyond the natural import of its own terms.<sup>(1)</sup> It is also a rule, founded upon the plainest justice, and applied to every form and kind of stipulation, that a condition or restrictive stipulation inserted by the vendor or otherwise made a part of the contract, however strong and positive may be its language, shall never be used by him as a means or instrument of sustaining and rendering successful any fraudulent conduct or practices on his part, and this doctrine has frequently been applied to cases of mere mistake where there was no

dence that the annuity had ended (of course, by the death of the annuitant). It appeared that this annuity had been granted by a person entitled only in reversion to the property (so that it would not be payable until the prior estate had ended, and the reversion had become changed into possession), and that it was granted for the life of the survivor of four persons named. It was held that the description of it as a "life" annuity would naturally induce the vendee to believe it to be for *one* life only, and the omission to state the facts as they were was ground for defeating the vendor's suit for a specific performance. In *Martin v. Cotter*, 3 Jon. & Lat. 496, the property was described as being subject to an agreement dated 1804, for a lease for four (4) lives and one year; but it appearing that, by the provisions of this agreement, the four lives were not to be named until 1845, this uncertainty (or rather misleading description) was held to be a fatal objection to the vendor's relief. In *Howell v. Kightley*, 21 Beav. 331, certain leasehold estates (terms of years under leases—the lessee's interests) were sold under a condition that the possession of the lessee, or those representing him, should be taken as conclusive evidence of a due performance of all covenants in the lease on his part, or of a sufficient waiver by the lessor of any breach by the lessee of such covenants "up to the completion of the sale." Held, that this condition covered all breaches by the lessee up to the date of the contract in suit, but did not include a breach by the lessee for which the lessor became entitled to re-enter and forfeit the lease, committed after the date of the contract, and before the matter was finally completed by carrying the contract into execution. The words, "up to the completion of the sale," were held not sufficiently certain to require the court and the vendee to adopt a construction which should cover the latter named breach. See, also, *Southby v. Hutt*, 2 My. & Cr. 207; *Symons v. James*, 1 Y. & C. C. C. 487; *Adams v. Lambert*, 2 Jur. 1078; *Cruse v. Nowell*, 25 L. J. Ch. 709; *Brumfit v. Morton*, 3 Jur. (N. S.) 1198.

(1) *Southby v. Hutt*, 2 My. & Cr. 207; *Osborne v. Harvey*, 7 Jur. 229; and in *Dick v. Donald*, 1 Bl. (N. S.) 653, it was held that a condition by the vendor that certain named title deeds only were to be given up and turned over to the vendee, would not be extended so as to permit the vendor to limit the title to be produced by him to that shown by those deeds alone, but he must make out a good title—in other words, this stipulation did not affect the ordinary duty as to making out title.

suggestion of knowledge or wrongful intent.(1) As examples of this rule, a condition providing that the vendee shall not avoid the contract on account of any error, deficiency, and the like, but shall be compelled to accept with compensation, is rendered entirely nugatory if there has been any intentional misrepresentation by the vendor; (2) and the same is true of a condition that objections to the title must be made within a specified time.(3) A condition by which the vendor reserves the power of rescinding the contract upon the purchaser's objecting to the title as shown by the abstract, will not enable the vendor, intentionally, to deliver a defective abstract which must necessarily be objected to, with the design of having an opportunity to rescind.(4)

SEC. 369. If the conditions state facts upon which they are based, such facts must be proved.(5)

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### SECTION III.

*Time as affecting the right to a performance; when and when not of the essence of the contract.*

SEC. 370. In the first section of this chapter the equitable doctrine is stated, that an executory contract of sale is regarded in many respects as if executed; that the equitable estate in the subject-matter vests in the purchaser, and the vendor holds the legal estate as his trustee, while the equitable property in the price passes to the vendor. From this broad principle are deduced many of the equitable doctrines and rules which govern the rights and duties of the parties in carrying out the agreement, so far as such doctrines and rules differ from those which prevail at law. One of the most important of the doctrines derived from this principle is that which permits an enforcement of the contract, although the plaintiff has not exactly complied with all of its terms, and especially with those which prescribe the time for the performance of various acts. As has already been stated, equity draws a broad distinction between those terms of a contract which are

(1) See sections on Misrepresentation and Mistake.

(2) *Stewart v. Alliston*, 1 Mer. 26; and this has been so held where the error was a mistake merely, when large. See *ante*.

(3) *Price v. Macauley*, 2 DeG. M. & G. 339, 347.

(4) *Morley v. Cook*, 2 Hare, 111.

(5) *Symons v. James*, 1 Y. & C. C. C. 487; and see *Johnson v. Smiley*, 17 Beav. 223.

material, and those which are formal, and requires a compliance with the former only by the party seeking its relief, dispensing entirely with the others, and permitting a compensation in the place of their actual performance. Even among the material terms, equity seems to distinguish between those which are of the essence of the contract—which must be strictly and exactly complied with—and others in respect of which a substantial compliance is sufficient.

SEC. 371. The ground of the rules concerning time and the effect of delay is often said to be the principle that time in equity is not generally material. At law it is otherwise; for the plaintiff, suing upon a contract, must show that he has done all the acts on his part within the prescribed time where such period is fixed by stipulation, and within a reasonable time, where there is no stipulation upon the subject. To whatever source it be referred, whether to the principle that an equitable estate in the subject-matter is transferred to the purchaser, or to the general notion that time is immaterial, the doctrine is firmly established, that in all ordinary cases of contract equity does not regard time as of the essence of the agreement; or, to state the doctrine in a more particular form: In all ordinary cases of contract for the sale of land, if there is nothing special in its objects or in its subject-matter, although a certain period of time or particular day is stipulated for the completion of the agreement, or the execution of any of its terms, equity treats this provision as formal rather than essential, and permits a party, who has suffered the period to elapse within which he should have done the acts on his part according to the literal terms of his agreement, to perform such requisite acts after the prescribed date, and to compel a performance by the other party notwithstanding his own delay. This general doctrine is established by an unbroken series of decisions, but it is subject to various exceptions, limitations, and modifications which will be examined and discussed in the present section.(1)

(1) One of the leading cases is *Seton v. Slade*, 7 Ves. 265, in which the doctrine is thus stated by Lord ELDON: "To say time is regarded in this court as at law is quite impossible. The case mentioned, of a mortgage, is very strong. At law the mortgagee is under no obligation to reconvey at that particular day—*i. e.*, at and after the pay-day when the mortgagor has failed to pay—and yet this court says, that though the money is not paid at the time stipulated, if paid with interest at the time a reconveyance is demanded, there shall be a reconveyance, upon this ground, that the contract is, in this court, considered a mere loan of money, secured by a pledge of the estate. But that is a doctrine upon which this court acts against what is the *prima facie* import of the terms of the agreement itself, which does not import, at law, that once a mortgage always a mortgage. But equity says that. \* \* \* I only say, time is not regarded here as at law.

**SEC. 372.** In this discussion I shall adopt the following order and subdivision of topics: 1. The general doctrine that time is not ordinarily essential, with its applications and illustrations. 2. Where time is essential, including the three cases of (a) essential from the nature of the subject-matter or object of the contract, (b) essential by reason of express stipulation, (c) essential by reason of notice fixing a period for completion. I shall then consider the effect of delay in general, viz.: 3. Where the delay is caused by the act or omission of the parties.

So in the instance of a mortgage with interest at five per cent, and a condition to take four per cent if regularly paid; or at four per cent, with a condition for five per cent if not regularly paid. At law you might, in that case, recover the five per cent, for it is the legal interest. But this court regards the five per cent as a penalty for securing the four; and time is no further the essence than that, if it is not paid at the time, the party may be relieved from paying the five per cent by paying the four per cent, and putting the other party in the same condition as if the four per cent had been paid; that is, by paying him interest on the four per cent as if it had been received at the time. So in this court, before courts of law dealt with a bond under a penalty as they do now, time was the essence there; but this court relieved against the penalty long before a court of law, and there are many other instances. But there is another circumstance. The effect of a contract for purchase is very different at law and in equity. At law, the estate remains the estate of the vendor, and the money that of the vendee. It is not so here. The estate, from the sealing of the contract, is the real property of the vendee. It descends to his heirs; it is divisible by his will; and the question, whose it is, is not to be discussed merely between the vendor and vendee, but may be discussed between the representatives of the vendee. Therefore, I do not take a full view of the subject, upon the question of time, unless that is taken into consideration." It will be seen that Lord ELDON refers the doctrine to both of the principles, viz., to the general notion that time, in equity, is not material, and to the theory that a contract of sale is executed and transfers the property to the vendee. In *De Camp v. Feay*, 5 S. & R. 323, a vendee made a considerable default in payment of the price when due, and upon tendering it, several months afterwards, the vendor refused to accept it, or give the deed. The court held, that the vendee was entitled to a specific performance, and the doctrine was thus laid down by GIBSON, J.: "Where time admits of compensation, as it perhaps always does where the lapse of it arises from money not having been paid at a particular day, it is never an essential part of the agreement. Neither do I consider that the subsequent agreement, by which the parties stipulated that if the whole sum should not be paid at a certain day, the payment then made should be forfeited, and the original bargain be at an end, gave the defendant (the vendor) any additional right to rescind. *Vernon v. Stephens*, 2 P. Wms. 66, comes fully up to the case before us; and there the subsequent agreement was not only positive, that in default of payment by a particular day the articles should be delivered up, but the parties solemnly entered into an order of the court to enforce performance of it; yet the chancellor, on the ground that the agreement and order were in the nature of a penalty, and intended only as a security for the payment of the money, relieved against them on payment of the principal, interest and costs, saying, that where the defendant has received that he has no right to complain of having suffered. It is precisely on the same principle that in other cases

4. Where caused by a defect in the title. 5. The rights of parties to interest or the rents and profits, as compensation in case of a delay which does not absolutely rescind the agreement. In this discussion all questions concerning performance with compensation are postponed, as far as possible, until the next section.

SEC. 373. *I. Time not ordinarily essential.*—The general doctrine has already been stated, with many authorities, and need not be repeated. It is important, however, to distinguish at the outset between “essential” and “material.” While time may not be of the essence of a contract, it may still be material and important, as will be shown in subsequent subdivisions of this section. Where the older cases laid down the principle that time is not ordinarily *material* in equity they

chancery relieves against the exercise of a legal right expressly arising out of a contract, as in the case of a mortgage; or a right of entry for a forfeiture incurred by the non-performance of a covenant in a lease to pay the rent at a particular day; or against the forfeiture of the deposit by reason of the non-payment of the purchase-money; or against payment of a higher rate of interest, if the principal be not paid by a particular day.” *Vyse v. Foster*, L. R. 7 H. L. 318; *Shepherd v. Walker*, L. R. 20 Eq. 659; *Webb v. Hughes*, L. R. 10 Eq. 281; *McMurray v. Spicer*, L. R. 5 Eq. 527; and the remarks of Lord CAIRNS and Sir JOHN ROLT, in *Tilley v. Thomas*, L. R. 3 Ch. 61, 67, 69, quoted *ante*, under section 315; and of ALDERSON, B., in *Hipwell v. Knight*, 1 You. & Coll. 415. See, also, *Pincke v. Curteis*, 4 Bro. C. C. 329; *Radcliffe v. Warrington*, 12 Ves. 326; *Parkin v. Thorold*, 2 Sim. (N. S.) 1; 16 Beav. 59; *Hull v. Sturdivant*, 46 Me. 34; *Jones v. Robbins*, 29 Me. 351; *Dressel v. Jordan*, 104 Mass. 407; *Quinn v. Roath*, 37 Conn. 16; *Edgerton v. Peckham*, 11 Paige, 352; *Pinckney v. Hagadorn*, 1 Duer, 90; *Viele v. Troy & Boston R. R.*, 21 Barb. 381; *Hubbell v. Von Schoening*, 49 N. Y. 326; *Van Campen v. Knight*, 63 Barb. 205; *Huffman v. Hummer*, 2 C. E. Green, 263; *Sharp v. Trimmer*, 9 C. E. Green, 422; *Remington v. Irwin*, 2 Harris, 143; *Smoot v. Rea*, 19 Md. 406; *Brock v. Hidy*, 13 Ohio St. 305; *Ewing v. Crouse*, 6 Ind. 312; *Keller v. Fisher*, 7 Ind. 718; *Linton v. Potts*, 5 Blackf. 396; *Shafer v. Niver*, 9 Mich. 253; *Bomier v. Caldwell*, 8 Mich. 463; *Snyder v. Spaulding*, 57 Ill. 486; *Crittenden v. Drury*, 4 Wisc. 205; *Spalding v. Alexander*, 6 Bush, 160; *Walton v. Wilson*, 30 Miss. 576; *Knott v. Stephens*, 5 Oreg. 235; *Morgan v. Bergen*, 3 Neb. 209; *King v. Ruckman*, 5 C. E. Green, 316; *Bullock v. Adams*, 5 C. E. Green, 367; *Prince v. Griffin*, 27 Iowa, 514; *Steele v. Branch*, 40 Cal. 3. In *Scarlett v. Stein*, 40 Md. 512, it was held that parol evidence is admissible to show that time is not essential. Where time is not essential, the contract subsists so long as neither party takes any steps to assert his right as against the other, and to call upon that other for a completion; so long, that is, as the vendor does not tender a deed, or the vendee does not tender the price, or the security stipulated to be given for the price; in short, there is no default which raises the question of time while neither party has made a demand upon the other and tendered or offered performance by himself. In such a condition of the contract either party may make the proper tender or offer of performance, on his own part, and demand and compel performance by the other, until the right of action is barred by the statute of limitations. *Leaird v. Smith*, 44 N. Y. 618; *Van Campen v. Knight*, 63 Barb. 205; *Crabtree v. Levings*, 53 Ill. 526.

used the word *sub modo*, in a special and limited sense—in fact, as substantially synonymous with *essential*. They simply intended to show that while, in many cases at law, although a party's rights were gone when he had permitted the day specified in the contract to pass without doing the act required by its terms to be done on that day, equity might interpose and suffer him to do the act afterwards and regain his rights thereby, if he compensated the other party for the delay—which compensation was often a payment of interest. It was never intended that equity regarded time as of no consequence in fulfilling an agreement, and relieved a party after any and every delay. If time is essential, then the act to be done must be done on or before the day specified for its performance, or all rights are lost. If it is not essential, equity *may* permit the act to be done after the day; *may* permit, not *must*; for the delay or failure may be such, or from such a cause that equity will refuse to interpose.(1)

SEC. 374. Returning to the doctrine that time is not ordinarily essential in equity. This doctrine has been held in some cases to embrace unilateral engagements as well as those which consist of mutual promises—for example, contracts giving the party the option of purchasing, although he does not, on his part, promise to buy, and does not become bound until he signifies his acceptance of the offer. It is said that, in these and similar contracts, the exact time of performing or paying is not the essential point, and that a delay will not prevent their enforcement unless it is intentional, or so injurious to the other party as to admit of no adequate compensation.(2) It will be seen, however, in the sequel, that, according to other decisions, in this kind of contracts time is presumptively essential.(3) It is beyond all doubt that the doctrine under consideration applies with special force, and will always be applied—except in very special cases where the intention that it should be essential is expressed in the clearest manner by positive stipulation—to promises to pay money. A default in the payment at the day appointed, unless the delay be from such a cause, or be continued so unreasonably long as to be a ground for rescission—will always be relieved; in other words, the

(1) See remarks of Sir JOHN ROLT, in *Tilley v. Thomas*, L. R. 3 Ch. 61, 69, quoted *ante* under § 315, in which he says that the contract is *broken* in equity as well as at law—only equity may relieve the defaulting party from the effect of his breach. This is the substance of the doctrine that *time* is not essential.

(2) *Townley v. Bedwell*, 14 Ves. 591; *Ely v. Beaumont*, 5 S. & R. 124; *Kerr v. Day*, 2 Harris, 112; *D'Arras v. Keyser*, 2 Casey, 249; see *Moss v. Barton*, L. R. 1 Eq. 474.

(3) See *post*, §§ 387, 388, 411.

mere suffering the pay-day to pass, will not preclude the party from enforcing the contract. The reason is that by a payment of the principal and the interest for the time which has elapsed, equity considers the creditor party as fully compensated.(1)

(1) *Pritchard v. Todd*, 38 Conn. 413; *Sharp v. Trimmer*, 9 C. E. Green, 422; *De Camp v. Feay*, 5 S. & R. 325, 327; *Converse v. Blumrich*, 14 Mich. 109, 114; *Shortall v. Mitchell*, 57 Ill. 161; *Young v. Daniels*, 2 Clarke (Iowa), 126; *Longworth v. Taylor*, 1 McLean, 395; 14 Peters, 172. The doctrine was so ably discussed in the last-named case by Judge STORY, that I shall quote from it at some length. Longworth made an agreement under seal for the purchase of some land, in 1814, from Taylor, one-third of the price to be paid down, one-third in six months, and the one-third at the end of a year, and a deed of conveyance to be given within three months from the date of the contract. The first one-third was paid, and L. took possession, but no deed was made, and the second installment was not paid, but was postponed by agreement that L. should pay interest at the rate of nine per cent. L. paid the interest until the end of 1819, and erected buildings which increased the value of the land. In 1819 or 1820 L. was notified that one C. was about to sue in equity to recover the land. Such suit was brought in 1823, and ended in 1830 by a decree for the defendants therein. In the meantime Taylor recovered possession of the land from L. by ejectment; this was in 1824. In 1825 L. brought suit against T. for a specific performance, but it was not brought on to a hearing until about 1835 (the other equity suit probably causing this delay in part), and resulted in a decree by the circuit court in favor of the plaintiff L. T. appealed to the U. S. supreme court, and their opinion was given by STORY, J., as follows: "The substantial question in the cause is, whether, under all the circumstances, the plaintiff L. is entitled to a specific performance of the contract for the purchase; and, upon the fullest consideration, we are of opinion that he is, and that the decree is therefore right. We shall now proceed to state the grounds upon which we hold this opinion. In the first place, there is no doubt that time may be of the essence of a contract for the sale of property. It may be made so by the express stipulations of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or the purchaser. And even where time is not thus expressly or impliedly of the essence of the contract, if the party seeking a specific performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part; or if there has, in the intermediate period, been a material change of circumstances affecting the rights, interests, or obligations of the parties; in all such cases courts of equity will refuse to decree any specific performance, upon the plain ground that it would be inequitable and unjust. But, except under circumstances of this sort or of an analogous nature, time is not treated by courts of equity as of the essence of the contract; and relief will be decreed to the party who seeks it, if he has not been grossly negligent, and comes within a reasonable time, although he has not complied with the strict terms of the contract. But in all such cases the court expects the party to make out a case free from all doubt, and to show that the relief which he asks is, under all the circumstances, equitable, and to account in a reasonable manner for his delay and apparent omission of duty. It does not seem necessary to cite particular authorities in support of these doctrines, although they are very numerous. It will be sufficient to refer to the cases of *Pratt v. Carroll*, 8 Cranch, 471; *Pratt v. Law*, 9 Cranch, 456, 493, 494; and *Brashier v. Gratz*, 6 Wheat. 528; in this court, and to *Seton v. Slade*, 7 Ves. 265;



SEC. 375. In pursuance of this doctrine the decisions are numerous, whereby purchasers who did not pay the price, and vendors who did not perfect their title and offer to convey, at the time prescribed, and even not until years had elapsed from that date, have been held

*Halsey v. Grant*, 13 Ves. 73; *Alley v. Deschamps*, 13 Ves. 225; *Hearne v. Tenant*, 13 Ves. 289; and *Hepwell v. Knight*, 1 Y. & C. Ex. C. 415; in England, as affording illustrations in point. In applying the doctrine above stated to the facts and circumstances of the present case, the first remark that occurs is that the first default was on the part of Taylor. By his contract he undertook to make a deed of general warranty of the premises in the course of three months after the date of the contract, the second installment not being payable until a long time afterwards. He never made any such deed nor offered to make it, and if he had it is obvious that instead of his being placed in the situation of a defendant in equity, as he now is, he would have been compelled to be a plaintiff, either to enforce a specific performance or to rescind the contract. The excuse for the omission is, that it was the duty of the other side to prepare and tender a formal deed to him for execution." (Saying that this rule is established in England, growing out of their modes of conveyancing, holds that there is no such rule in the United States.) \* \* \* "But waiving this consideration, let us proceed to others presented by the cases." Mentioning the default in payment in 1819, and the ejectment brought in 1822, he proceeds: "In the meantime L. had been left in the possession of the premises under the contract, had made improvements upon them, and had received the rents and profits with the acquiescence of Taylor. Under such circumstances, where there had been a part performance, and large expenditures on one side, under the contract, and acquiescence on the other side, it would be incompatible with established doctrine to hold that one party could, at his own election by a suit at law, put an end to the contract. It could be rescinded by Taylor only by the decree of a court of equity; which decree would, of course, require full equity to be done to the other party, under all the circumstances. Pending the ejectment, L. made several propositions for payment, varying from the original conditions, all of which were declined by T. \* \* \* The present bill was brought in the succeeding year (after the recovery in the ejectment), and the question is, whether, under all the circumstances of the case, L. is now entitled to a specific performance of the contract upon paying all the arrears of the purchase-money. Undoubtedly, if there were no grounds of excuse shown, accounting for the delay on his part to fulfill the contract between September, 1822, when the ejectment was brought, and June, 1825, when the present bill was filed, there might be strong reason to contend that he was not entitled to a specific performance of the contract." (He goes on to state the facts of Chamber's claim and suit, and holds that while the title was thus in doubt L. was excused from completing his contract with Taylor, and this accounts for and excuses his delay in filing the bill.) "There is no ground to assert that from the commencement of the present suit L. has not always been ready and willing to pay up the arrears of the purchase-money and to complete the contract. In our opinion the lapse of time is fairly accounted for by the state of the title, and therefore L. has not been guilty of any delay which is unreasonable or inexcusable." The following cases also illustrate the doctrine of the text: *Moote v. Scriven*, 33 Mich. 500 (delay by the vendee); *Sharp v. Trimmer*, 9 C. E. Green, 422 (by the vendor); *Brassell v. McLemore*, 50 Ala. 476 (by the vendee).

entitled to a specific performance, it being shown that the delay could be sufficiently explained and excused, and that it had not been in itself prejudicial to the other party beyond the means of reparation.(1) The rule is applied the more readily, a much longer delay is allowed, and the excuse is more leniently examined, and favorably received, when, during the period of delay, the purchaser has been in possession, and has been permitted to so remain, for the fact of such possession rebuts any presumption which might otherwise have arisen from the delay that the contract was abandoned, and shows that in the intention of the parties it was still kept as a subsisting and binding agreement; such, at all events, must, ordinarily, be the effect of the possession.(2)

SEC. 376. The doctrine equally applies to the purchaser and to the vendor. A vendor, who has not complied with the terms of his agreement by making out a good title, or by conveying or offering to convey, at the stipulated day, may still obtain a decree for specific performance notwithstanding his delay, provided it is not intentional, unreasonably long, or so injurious to the vendee that an enforcement would be inequitable. This results directly from the operation and effect of the contract in equity, already described, which vests the equitable estate in the purchaser, so that, being the beneficial owner of the subject-matter from the time of concluding the agreement, he is not necessarily nor ordinarily injured, so as to render an enforcement unjust, by a delay in carrying out the contract and conveying to him

(1) *Getchell v. Jewett*, 4 Me. 350; *Waters v. Travis*, 9 Johns. 450; *Barbadoes Toll Co. v. Vreeland*, 3 Green Ch. 157; *Morgan v. Scott*, 2 Casey, 51; *McLaughlin v. Shields*, 2 Jones, 283; *Jackson v. Ligon*, 3 Leigh, 161; *Sarter v. Gordon*, 2 Hill Ch. 121; *Wightman v. Reside*, 2 Dessaus. 578; *Craig v. Martin*, 3 J. J. Marsh. 50; *Gibbs v. Champion*, 3 Ohio, 335; *Keller v. Fisher*, 7 Ind. 718; *Bennett v. Welch*, 25 Ind. 140; *Brumfield v. Palmer*, 7 Blackf. 227; *Hall v. Delaplaine*, 5 Wisc. 206, 214; *Mason v. Wallace*, 3 McLean, 148; *Hepburn v. Auld*, 5 Cranch, 262; *King v. Hamilton*, 4 Pet. 311.

(2) *Shepherd v. Walker*, L. R. 20 Eq. 659. In *Waters v. Travis*, 9 Johns. 450, and *Barbadoes Toll Co. v. Vreeland*, 3 Green Ch. 157, a period of from twenty to twenty-three years had elapsed between the making and the enforcement of the contract, the vendee being in possession. See, also, on this point, *Ballard v. Walker*, 3 Johns. Cas. 60; *Delavan v. Duncan*, 49 N.Y. 485; *Baum v. Dubois*, 10 Wright, 537; *Tate v. Conner*, 2 Dev. Eq. 224; *Eppinger v. McGreal*, 31 Texas, 147. Possession by the vendee, without payment by him of the purchase-price, does not, however, prevent the statute of limitations from running against his right of action which has accrued, in New York; it is only when the vendee has fully performed on his part, and has thus become entitled to a conveyance, that the vendor is not permitted to set up the statute of limitations as a defense. *McCotter v. Lawrence*, 6 T. & C. 392; 4 Hun, 107.

the legal estate; (1) and *a fortiori* the delay can work no equitable injury to him when he has possession and use of the land, and receives its rents and profits during the interval. (2) If the vendor is unable to show a good title at the time prescribed in his contract, or even at the commencement of his own suit, it is sufficient, therefore, if he perfects it before the final hearing, or the report on title made in the progress of the cause by the master or referee. (3)

SEC. 377. The failure of the vendor to fulfill on his part at the appointed time will not defeat or prejudice his remedy, if the purchaser has acquiesced in the default, or has caused or promoted it by his own neglect or inability to pay the purchase-money at the time or in the manner agreed. A vendee, who wishes to be in a situation to demand punctual performance by the vendor, must himself be punctual, prompt, and ready. (4) If a purchaser finally receives all that he is entitled to under the agreement, including possession and a conveyance with good title, and did not demand an exact performance with respect to time, he cannot successfully object to the vendor's enforcement of his own liability to pay the price; but if at the time stipulated for completion the vendor could not make a good title

(1) *Musselman's Appeal*, 15 P. F. Smith, 480; *Bell's Appeal*, 21 P. F. Smith, 465; *Morgan v. Scott*, 2 Casey, 51; *Ley v. Huber*, 3 Watts, 367; *Tiernan v. Roland*, 3 Harris, 429; *Larison v. Burt*, 4 W. & S. 27; *Townsend v. Lewis*, 11 Casey, 125; *Mays v. Swope*, 8 Gratt. 46; *Daniel v. Leitch*, 13 Gratt. 195, 213.

(2) *Campbell v. Shrum*, 3 Watts, 60; *Musselman's Appeal*, *supra*; *Bell's Appeal*, *supra*, and cases in last note but one.

(3) *Jones v. Robbins*, 29 Me. 351; *Beebe v. Dowd*, 22 Barb. 255; *Dutch Church v. Mott*, 7 Paige, 77; *Brown v. Haff*, 5 Paige, 235; *Winne v. Reynolds*, 6 Paige, 407; *Seymour v. Delancy*, 3 Cow. 445; *Allerton v. Johnson*, 3 Sandf. Ch. 73; *Ley v. Huber*, 3 Watts, 363; *Tiernan v. Roland*, 3 Harris, 429, 436; *Wilson v. Tappan*, 6 Hammond, 172; *Cotton v. Ward*, 3 Monr. 313; *Lockett v. Williamson*, 37 Mo. 388; *Hepburn v. Dunlop*, 1 Wheat. 179.

(4) *Tiernan v. Roland*, 3 Harris, 429, 440; *Campbell v. Shrum*, 3 Watts, 60; *Potter v. Tuttle*, 22 Conn. 512; *Converse v. Blumrich*, 14 Mich. 109; *Wallace v. McLaughlin*, 57 Ill. 53; *Snyder v. Spaulding*, 57 Ill. 480, 487; as to the rights of the parties, where both have done nothing to perform or to enforce performance at the appointed time, or where the contract itself is entirely silent with respect to the time of completion, see *Leaird v. Smith*, 44 N. Y. 618; *Van Campen v. Knight*, 63 Barb. 205; *Knott v. Stephens*, 5 Oreg. 235; *Crabtree v. Levings*, 53 Ill. 526. Acts of a vendor, which are inconsistent with a purpose of strictly enforcing the provisions of the contract in respect to time—as, for example, his accepting the unpaid balance of the price after a condition as to time of payment has been broken by the vendee, amount to a waiver of objection to the vendee's default. *Grigg v. Landis*, 6 C. E. Green, 494; *Brassell v. McLemore*, 50 Ala. 476. And see, with respect to a waiver by either party, *Garrett v. Lynch*, 45 Ala. 204; *Foley v. Crow*, 37 Md. 51; *Page v. Greeley*, 75 Ill. 400.

nor give the possession, and the possession was a matter of real importance to the vendee, who was then ready and willing to accept it and pay the price, the vendor will not afterwards be able to enforce performance upon the objecting purchaser.(1) Nor can a vendor, in default with respect to time, subsequently obtain the relief if he did not use all the means within his power to perfect his title and complete the contract within a reasonable period of time;(2) nor where he fraudulently concealed the defect in his title which caused his delay.(3)

SEC. 378. *Clause in contract declaring it void or forfeited if the terms are not performed at the prescribed time.*—As a special case under the general doctrine discussed in the foregoing paragraphs, it remains to consider the effect of such a clause. It is assumed that the contract is not one in respect of which time is otherwise essential, either impliedly from the nature of the subject-matter or object of the agreement, or expressly from a stipulation incorporated into the instrument itself. It will appear in the sequel that, according to the weight of authority, such a clause does not, without something further, make time essential. The question, therefore, is, what is the effect of the clause inserted in an ordinary contract declaring it ended, and the rights of the defaulting party under it forfeited, if the terms or some particular term are not complied with at or before the prescribed day, when in fact the party fails to perform within that time according to his stipulation? At law such a clause would be operative, and a delay in fulfilling its requirements would undoubtedly work a forfeiture. Will equity relieve against such a forfeiture? The general doctrine which has been stated in the preceding paragraphs of this section shows that this question must, in many cases at least, be answered in the affirmative, since it has been shown that equity will often, and, indeed, generally, enforce a contract, although the party asking relief has lost his right to a legal remedy by his omission to comply with the provisions in respect to the time of performance. But it is necessary to examine the question more closely, and ascertain the exact conditions under which equity does or does not interpose to relieve against such a forfeiture.

(1) *Watts v. Waddle*, 6 Pet. 389; *McKay v. Carington*, 1 McLean, 51; *Cooper v. Brown*, 2 McLean, 495; *Tiernan v. Roland*, 3 Harris, 429; *Taylor v. Porter*, 1 Dana, 422.

(2) *King v. Hamilton*, 4 Pet. 311; *Tiernan v. Roland*, 3 Harris, 429; *Grundy v. Ford's Ex'ors*, Litt. Sel. Cas. 129; *Rider v. Gray*, 10 Md. 282, 286.

(3) *Christian v. Cabell*, 22 Gratt. 82.

SEC. 379. The fundamental principle upon which the answer to the question turns, is the following: Where a contract depends upon a condition precedent; or, in other words, where the intention of the parties is that no right shall vest until certain prescribed acts are done or omitted, or unless certain prescribed acts are done or omitted, at or before a specified time, then equity will not relieve against a breach of such precedent condition, for no court has the power to make a new contract for the parties which shall confer rights where no rights at all originally existed. But if a contract contains a condition subsequent; or, in other words, if the intention of the parties is that the rights under the agreement shall vest at once upon its conclusion—subject, however, to be defeated or ended upon the non-performance of the provision which constitutes the subsequent condition—or its non-performance at or before a specified day—then equity, by virtue of its general jurisdiction over penalties and forfeitures, has power to relieve the defaulting party from the loss or forfeiture caused by his breach of this subsequent condition. This power of relief would even more certainly exist when the breach was a failure, not to do the thing at all, but merely to do it at or within the time stipulated by the contract. It is, therefore, held, in a great number of cases, that the forfeiture provided for by such a clause as the one described above, on the failure of the party to fulfill at the proper time, unless such failure is intentional, or causes an injury to the other party which cannot be compensated, will be disregarded and set aside in equity; and the defaulting party, performing, or being ready and willing to perform, at a subsequent time, will be allowed to enforce the contract notwithstanding his delay. In short, the general doctrine is applied in the face of such an express provision declaring the contract ended in case of a non-fulfillment of its terms at the appointed day, unless the agreement is so worded that a compliance with these terms at the prescribed time is made a condition precedent to the vesting of any rights.(1) This doctrine has not,

(1) *Vernon v. Stephens*, 2 P. Wms. 66; *De Camp v. Feay*, 5 S. & R. 323, 326; *Edgerton v. Peckham*, 11 Paige, 352, 359. See *ante*, §§ 335, 336; *Clark v. Lyons*, 25 Ill. 105; *Snyder v. Spaulding*, 57 Ill. 480, 484. Compare, in connection with this subject, the cases cited *post* under § 390. In *McClartey v. Gokey*, 31 Iowa, 505, a contract of sale stipulated that on failure of the vendee to pay the installments as they fell due, or "the taxes hereafter to become due each year," the contract should be forfeited, and it was further provided that time should be of the essence of the contract; default was made by the vendee in paying the taxes for the year 1863, and the vendor paid them on April 8, 1869; but on May 22d, 1869,

however, been followed in some of the American decisions which have enforced such provisions as to the time of payment, according to their literal terms, as will appear from cases cited in the preceding footnote.

SEC. 380. Where the clause provides for a forfeiture upon the non-payment of the purchase-price, at the time or times stipulated, and is, therefore, intended to secure punctuality in the payment, it has been regarded almost a matter of course for a court of equity to disregard it, and to permit a subsequent payment, since interest is

the vendee tendered to him the amount thereof; *held*, that the contract was not forfeited by this default of the vendee. The court, probably influenced by the hardship of the case, if the forfeiture was enforced, thus disregarded the express provision by which the parties had made time essential. See, in comparison, *Snider v. Lehnherr*, 5 Oreg. 385; *Peck v. Brighton*, 69 Ill. 200; *Phelps v. Ill. Cent. R. R.* 63 Ill. 468. The case of *Grey v. Tubbs*, 43 Cal. 359, is a very strong one, in holding time to be made essential by such stipulations. The contract was for the sale of certain lots, and provided for the price to be paid in installments upon designated days, and added: "In the event of a failure to comply with the terms hereof by the [vendee], the [vendor] shall be released from all obligations in law or equity to convey said property, and the [vendee] shall forfeit all right thereto." The default consisted in not paying a quarter's interest which fell due January 1, 1868, but it was tendered on the last day of February, 1868, and the vendor refused to receive it, declaring that the contract was forfeited. The whole amount of principal was afterwards tendered within the time stipulated by the contract, together with the interest thereon. The court held that the stipulation above recited had made time essential, and that the vendee's default had wrought a forfeiture of the contract. RHODES, J., after quoting the terms of the stipulation, says (p. 364): "It would be difficult to express with greater clearness and certainty than the parties did in this contract, that time is of the essence of the contract, except it were done by the insertion of those very words in the instrument. Courts of equity have not the power to make contracts for parties, nor to alter those which the parties have deliberately made; and whenever it appears that the parties have in *fact* contracted, that if the purchaser make default in payments, as agreed upon, he shall not be entitled to a conveyance, and shall lose the benefit of his purchase; and when it also appears that the purchaser is without excuse for his delay, the courts will not relieve him from the consequences of his default. They will not inquire into the motive, or the sufficiency of the motive, that induced the parties to contract that time should be essential in the performance of any of the agreements contained in the contract of purchase; but if it appears that the parties have thus contracted, the courts of equity will not disregard the contract in order to give effect to some vague surmise that all that the vendor intended to secure by the contract was the payment of the purchase-money, with interest, at some indefinite time." The peculiarity of this decision lies, not in holding that when time has been made essential, the contract will be enforced in equity, according to its terms, but in holding that time is made essential by such stipulations as the one in this case. Compare with this decision the cases of *Farley v. Vaughn*, 11 Cal. 227; *Steele v. Branch*, 40 Cal. 3.

treated as a sufficient compensation for the delay.(1) But even here the failure must not be willful, nor the delay unreasonable.(2) If the forfeiture is made to result from the vendor's failure to perfect his title, or to execute a conveyance at the appointed day, a court of equity does not so readily disregard it, as in the case of non-payment, probably because there is no certain standard, like interest, by which the compensation may be measured and fixed. In order that the forfeiture resulting from this cause—from the vendor's failure to perform at the time—may be set aside, and his subsequent performance admitted, the default itself must happen through accident or mistake, and the loss or injury done to the purchaser must be susceptible of compensation.(3)

SEC. 381. Acts of part performance by the purchaser—taking possession of the land, part payment of the price, the making of valuable improvements—may, of themselves, constitute a separate and sufficient ground, independently of the provisions of the contract, for relieving him from the effects of a forfeiture incurred by him through failure to complete his performance within the allotted time.(4) If the defendant's delay, or default, has caused the plaintiff's failure to perform in time, he cannot object to such failure as a defense, however plain and explicit may be the provision of the contract requiring punctuality.(5) A vendor, who cannot make a clear title in time, cannot, therefore, set up the purchaser's default in prompt payment of the price.(6) Finally, the condition of forfeiture may be waived, and is waived by the conduct of the party entitled to enforce it, which is only consistent with the continued efficacy and subsisting obligation of the contract.(7)

SEC. 382. *II. Time, when essential.*—Although, in ordinary cases, time is not essential, yet it may be, and is, essential whenever the intention of the parties, as shown by the contract, is clear that the

(1) *Sanborn v. Woodman*, 5 Cush. 36; *Wells v. Smith*, 7 Paige, 22, 24, 28; *De Camp v. Feay*, 5 S. & R. 323, 326; *Remington v. Irwin*, 2 Harris, 143, 145; *Hall v. Delaplaine*, 5 Wis. 206; and cases cited in the last note; but see *Grey v. Tubbs*, 43 Cal. 359.

(2) *Jones v. Robbins*, 29 Me. 351; *Hancock v. Carlton*, 6 Gray, 39.

(3) *Hill v. Barclay*, 16 Ves. 402; 18 Ves. 56; *Reynolds v. Pitt*, 19 Ves. 134; *Jones v. Robbins*, 29 Me. 351; *Paschall v. Passmore*, 3 Harris, 295, 306.

(4) *Edgerton v. Peckham*, 11 Paige, 352, 359; *Bellamy v. Ragsdale*, 14 B Mon. 293.

(5) *Potter v. Tuttle*, 22 Conn. 512; *Snyder v. Spaulding*, 57 Ill. 480, 487.

(6) *Converse v. Blumrich*, 14 Mich. 109; *Wallace v. McLaughlin*, 57 Ill. 53.

(7) *Ewing v. Gordon*, 49 N. H. 460; *Sharp v. Trimmer*, 9 C. E. Green, 422.

performance of its terms should be accomplished punctually at the stipulated day; it is a matter of intention, and the intention must govern.(1) This intention may be shown either by the nature of the subject-matter or purpose and object of the agreement, or it may be embodied in an express stipulation. There are three cases to be examined, in the first two of which time is made essential by the terms of the original contract, while in the third, not being originally essential, it becomes so by the subsequent acts of one of the parties. They are, 1, where the essential quality of time inheres in the very nature of the subject-matter, or in the object of the agreement; 2, where it is the subject of an express stipulation; and 3, where time not being originally essential, one of the parties delays in fulfilling his terms of the agreement, and the other party, by a notice, prescribes a definite period within which the contract must be completed, or else be abandoned. I shall consider these cases separately in the order stated.

SEC. 383. 1. *Where time is originally essential from the nature of the subject-matter, or from the purpose and object of the contract.*—There are several particular kinds or species of contracts, in respect of which it is firmly settled, by the English decisions, that time is essential on account of the subject-matter, or the purpose for which the agreement is made. Some of these instances seem to be peculiar to the modes of conducting business and the special forms of ownership which prevail in England, and are, therefore, confined to that country. But the doctrine which underlies them all has been fully recognized and adopted in the United States, and is constantly applied to the cases within it, which arise from our simpler modes of conveyancing and species of estates.

SEC. 384. When the nature of the subject-matter is such that its value *necessarily* changes—that is, either increases or decreases with the mere lapse of time—time is then of the essence of the contract, and performance must be completed at the specified period. The most common and plain example of this rule may be seen in agreements for the sale of reversionary interests.(2) It would seem also that con-

(1) See *Hipwell v. Knight*, 1 Y. & C. Ex. 401; *Grey v. Tubbs*, 43 Cal. 359; *Miller v. Miller*, 25 N. J. Eq. 354; *Knott v. Stephens*, 5 Oreg. 235; *Quinn v. Roath*, 37 Conn. 16; *King v. Ruckman*, 5 C. E. Green, 316; *Bullock v. Adams*, 5 C. E. Green, 367; *Prince v. Griffin*, 27 Iowa, 514.

(2) *Hipwell v. Knight*, 1 Y. & C. Ex. 401, 416, per ALDERSON, B: "If, therefore, the thing sold be of greater or less value according to the effluxion of time, it is manifest that time is of the essence of the contract; and a stipulation as to



tracts by a lessee for the sale or assignment of leasehold interests, terms for years, and also life estates, must fall under the same rule. Closely analogous in form, and really governed by the same principle, is the case of contracts the subject-matter of which is from its nature liable to frequent, sudden, or considerable changes or fluctuations in value; but in England it would seem hardly possible that an agreement for the sale of land could fall under this particular rule, and its operation is there confined to other kinds of subject-matter.(1) In the United States—at least in some of the states—the value of land in a given locality is not so stable as in England; it is subject to more rapid rises and falls; it is often exceedingly fluctuating, and even speculative. As a consequence of this fact, the American courts have been more liberal than the English in extending the above rule concerning the effect of fluctuation of value, to contracts for the sale of land; not, of course, to the extent of impairing the general doctrine that time is non-essential in agreements for the sale of land, but special circumstances of the case are more regarded, and their effect is allowed to be more controlling.(2) In like manner, and for

time must there be literally complied with in equity as well as at law.” *Newman v. Rogers*, 4 Bro. C. C. 391, 393, per Lord ROSSLYN: “For no man sells a reversion who is not distressed for money, and it is ridiculous to talk of making him a compensation by giving him interest on the purchase-money during the delay.” See, also, *Spurrier v. Hancock*, 4 Ves. 667; *Carter v. Dean of Ely*, 7 Sim. 211; *Hoyt v. Tuxbury*, 70 Ill. 331.

(1) See *Doloret v. Rothschild*, 1 S. & S. 590.

(2) In *McKay v. Carrington*, 1 McLean, 50, it was held that where land has been bought for the purpose of selling again, and its value had greatly diminished, and wrong would be done to the defendant by enforcing it after a delay, time would be regarded in equity as essential; and in *Pillow v. Pillow*, 3 Humph. 644, a judgment-creditor and his debtor agreed that the latter should pay the judgment in land at a price to be fixed by valuers; the debtor delayed his performance until the land has largely risen in value, and it was held that he could not then enforce performance upon the creditor; see, also, *Holt v. Rogers*, 8 Pet. 420; *Jones v. Robbins*, 29 Me. 351; *Hoyt v. Tuxbury*, 70 Ill. 331; *Brashier v. Gratz*, 6 Wheat. 528; *Jennisons v. Leonard*, 21 Wall 302; *Goldsmith v. Guild*, 10 Allen, 239; *Kirby v. Harrison*, 2 Ohio St. 326, 332; *Richmond v. Gray*, 3 Allen, 25; *Hepburn v. Auld*, 5 Cranch, 262. In *Brashier v. Gratz*, 6 Wheat. 528, which was a suit by vendee for a specific performance, the vendor's title at the date of the contract was doubtful, and a suit by a third person was then pending against him to recover the land; but the vendee, knowing these facts, agreed to take the risk, and gave his notes for the price, payable at certain fixed dates. Vendee did not pay these notes when they fell due, but waited until the suit against the vendor ended in his favor, and then offered the price, and on refusal by the vendor brought the suit to enforce. Held, that as the plaintiff contracted to buy the vendor's interest, and as this depended for its value upon uncertain and future events, he could not lie by until the doubt was settled in the vendor's

the same reason, if the consideration of the contract is in its nature changeable, fluctuating, or perishable, time would be *prima facie* essential, or at least very material.(1)

favor, and then enforce a performance. In *Jennisons v. Leonard*, 21 Wall. 302, woodland, chiefly valuable for the timber, was sold for \$7,000, payable in monthly installments in proportion to the amount of timber cut, the price to be fully paid up within three years. The vendee for a short time complied with the terms, but soon failed to pay in proportion to the amount of timber cut, and the amount of \$5,000 of arrears had accumulated. *Held*, that time was essential, and the vendor might, without giving notice, or returning collateral securities in his hands, retake possession of the land, and sell the cut timber, and apply the proceeds in payment, and might at same time sue to recover the balance of the arrears. HUNT, J., in delivering the opinion, said: "It is contended that the vendor had no right, under the contract, to re-enter upon the premises and take possession of the down timber. This contention is based upon the idea that time was not of the essence of the contract, and that although the vendee was in arrears of payment to an amount exceeding \$5,000, this gave no right to the vendor to declare the contract forfeited. Considering that the intention of the parties determines the question, the claim can scarcely be sustained in relation to a sale of timber lands, where the entire value of the estate consists in the timber standing upon them, and where it is provided that there shall be monthly payments, to be regulated by the quantity of timber cut, and where it is provided that a given quantity shall be cut during every month. That the parties should not have intended to require the payments to be kept up in the ratio of the cutting, and that the vendor should not have intended to reserve his only practical protection in this respect, viz., a right of entry in the case of a failure, cannot readily be believed. \* \* \* This was one of the sales of real estate by contract, so common in this country, in which the title remains with the vendor, and the possession passes to the vendee, the legal title remains in the vendor, while an equitable interest vests in the vendee to the extent of the payments made by him. As his payments increase, his equitable interest increases, and when the contract-price is fully paid, the entire title is equitably vested in him, and he may compel a conveyance of the legal title by the vendor, his heirs or his assigns. The vendor is a trustee of the legal title for the vendee to the extent of his payment. The result of this state of things is quite unlike that of a conveyance subject to a condition subsequent which is broken, and where a re-entry or claim of title for condition broken, is necessary to enable the vendor to restore to himself the title to the estate. The legal title having in that case passed out of him, some measures are necessary to replace it. In the case of a contract like that we are considering, no legal title passes. The interest of the vendee is equitable merely, and whatever puts an end to the equitable interest—as notice, an agreement of the parties, a surrender, an abandonment—places the vendor where he was before the contract was made." See *Doar v. Gibbes*, 1 Bailey Ch. 371; *Colcock v. Butler*, 1 Dessaus. 307; *Jackson v. Edwards*, 22 Wend. 498.

(1) *Goldsmith v. Guild*, 10 Allen, 239, the vendor contracted to sell land in 1864, while the value of legal-tender notes, as compared with gold, was constantly fluctuating. The contract, dated March 19th, but not signed and delivered until March 23d, provided that "the papers should pass within ten days." The vendee contended that the ten days should run from the delivery of the contract on the 23d; the vendor that they commence from the date, the 19th. The vendor was

SEC. 385. Under the rule concerning a subject-matter fluctuating in value, it is settled that time is essential in contracts for the sale and purchase of public stock;(1) and in those relating to the transfer of shares in business corporations and joint-stock companies;(2) and in contracts for life annuities.(3) Another very important class of contracts, in which time is essential from the very object and purpose of the agreement, consists of those made with the direct object of promoting or carrying out business and commercial enterprises, including those for the sale and purchase of land to be used for carrying on trade and business.(4) Another class embraces contracts for the sale

ready and willing to convey on the 29th, but the vendee refused to pay before April 2d, and on that day he tendered the price which was refused on the ground that it was too late. The vendee thereupon sued for a specific performance, but his claim was dismissed, the court deciding in favor of the defendant's contention that plaintiff's right had been lost by the lapse of time. The court, per CHAPMAN, J., said: "The strict rule of law, in respect to time as an essential part of a contract, does not prevail in equity, and the doctrine that "time is not of the essence of the contract," has been applied in many cases. But this doctrine applies to sales of property only in cases where time is immaterial to the value, and is urged only by way of pretense or evasion (this is certainly a *very* incorrect and partial statement of the doctrine), and does not apply to a sale of property the value of which is subject to daily fluctuation. *Doloret v. Rothschild*, 1 S. & S. 590. In this country time is regarded as more important in respect to the sale of land than in England, because the value of land is more fluctuating here than there. *Hepburn v. Auld*, 5 Cranch, 262; *Richmond v. Gray*, 3 Allen, 25. In the present case, the evidence tends to show that the property was subject to frequent fluctuations in value on account of the frequent and almost daily fluctuations in the gold market, and that there was an actual change in its value; and we cannot doubt that time was not only an essential part of the contract in fact, but that it was so regarded by the parties when they made their contract." See *Booten v. Scheffer*, 21 Gratt. 474, where the consideration was payable in confederate notes which were rapidly depreciating. But the case is not strictly in point, since there was the additional element of the vendee's intentional delay until the notes had fallen in value, so that he could take advantage of their decline.

(1) *Doloret v. Rothschild*, 1 S. & S. 590; *Forrest v. Elwes*, 4 Ves. 492.

(2) *Sparks v. Liverpool Water-Works Co.*, 13 Ves. 428; *Campbell v. London & Brighton Ry. Co.*, 5 Hare, 519.

(3) *Withy v. Cottle*, T. & R. 78.

(4) *Coslake v. Till*, 1 Russ. 376; *Walker v. Jeffreys*, 1 Hare, 341; *Wright v. Howard*, 1 S. & S. 193; *Seaton v. Mapp*, 2 Coll. C. C. 556; *Parker v. Frith*, 1 S. & S. 199, n.; *Macbryde v. Weeks*, 22 Beav. 533. This rule has been applied to a contract for the sale of land purchased for the erection of mills. *Wright v. Howard*, 1 S. & S. 190. It is also applied to contracts for the sale of, or relating to mines and works connected with them, on the ground that the business is so fluctuating, uncertain and speculative. *Prendergast v. Turton*, 1 Y. & C. C. C. 110, per KNIGHT-BRUCE, V. C.; *Clegg v. Edmondson*, 26 L. J. Ch. 673, 681, per KNIGHT-BRUCE, L. J.; *Parker v. Frith*, 1 S. & S. 199, n.; *City of London v. Mitford*, 14 Ves. 58, per Ld. ELDON; *Eads v. Williams*, 4 DeG. M. & G. 674; *Macbryde v. Weeks*, 22 Beav.

and purchase of a dwelling-house and accompanying land for the purpose of being used by the vendee as a residence ;(1) but this does not include those for the sale and purchase of land to be used for the purpose of building a residence.(2)

SEC. 336. The following are some further particular kinds of contracts in which time has been held to be essential : for the sale of an estate to pay off the debts of the vendor when they bear a higher rate of interest than he would receive on the unpaid purchase-price ;(3) covenants to renew leases for lives or for years ;(4) contracts in which the price is to be fixed by valuers ;(5) contracts in which the money to be paid is to be shared among the members of a fluctuating body, as an ecclesiastical corporation in England.(6) If a contract stipulates that time shall be essential with respect to provisions which are in the vendor's favor, a court of equity will regard it as also essential with respect to the provisions favorable to the vendee, so as to prevent what might otherwise be unjust and inequitable.(7) And in general, whenever, from the terms of the agreement, or from the nature of the subject-matter, the treating time as non-essential would produce a hardship, and delay by one party in completing or in complying with a term, would necessarily subject the other party to serious injury or loss, time will be held essential.(8)

SEC. 387. *Unilateral contracts.*—In respect to unilateral contracts,

533. To a contract providing for a supply of coal, which fluctuated in value from day to day, *Pollard v. Clayton*, 1 K. & J. 462 ; *Crofton v. Ormsby*, 2 Sch. & Lef. 604, per Lord REDESDALE. To a contract for the purchase of patent rights, *Payne v. Banner*, 15 L. J. Ch. 227. And in England to contracts for the sale of a public-house, tavern, as a going concern, so that if the title is not made out at the day, the vendor cannot enforce a specific performance. *Cowles v. Gale*, L. R. 7 Ch. 12 ; *Day v. Luhke*, L. R. 5 Eq. 336.

(1) *Levy v. Lindò*, 3 Meriv. 81 ; *Tilley v. Thomas*, L. R. 3 Ch. 61, 67 ; in this case vendor agreed to give the "possession" at a certain day ; he offered to deliver the possession, but had not a good title at that time. Held, "possession" meant possession *with* a good title. But see *Webb v. Hughes*, L. R. 10 Eq. 281.

(2) *Wells v. Maxwell*, 32 Beav. 408.

(3) *Popham v. Eyre*, Lofft, 786.

(4) *Eaton v. Lyon*, 3 Ves. 690.

(5) *Morse v. Merest*, 6 Mad. 27.

(6) *Carter v. Dean of Ely*, 7 Sim. 211.

(7) See *Seaton v. Mapp*, 2 Coll. C. C. 564, per KNIGHT-BRUCE, V. C.

(8) In *Coslake v. Till*, 1 Russ. 376, a tenant who had no interest for any definite time, agreed to sell his good-will and business, the transfer to be completed at a certain day named ; and the provision, in respect to completion, was held essential, since, if the transfer was not made on that day, the vendor might render himself liable as a tenant for the year next following. And see, also, *Gale v. Archer*, 42 Barb. 320 ; *Booten v. Scheffer*, 21 Gratt. 474.

there is some discrepancy among the authorities. One group of decisions holds that with respect to them, time is, and necessarily must be, essential, in the strict sense of the term; while another group holds that time is merely material, and not essential. This conflict may, perhaps, be reconciled by a suggestion drawn from the form and provisions of the contracts themselves. Where the contract is really an offer on one side, with a provision that this offer must be assented to and accepted, when a mere acceptance is contemplated, or payment must be made, when payment was the act of acceptance contemplated, at or before a specified date, then, of course, the act of assent or of payment must be done within the prescribed time, and time is from the very form of the contract essential. If, therefore, a vendor agrees to convey, if payment be made at or before a given date, or if an option is given which is to be accepted by payment within a given time, then the time of the payment is certainly essential; in fact, payment is a condition precedent to the vesting of any right in the vendee. If, however, the offer or option given requires an assent and acceptance within a given time, such assent must be made within the time prescribed, and the contract thereby becomes concluded and mutual; but whether time is essential with respect to its subsequent performance, must depend upon its object or the nature of its subject-matter.(1)

(1) *Brooke v. Garrod*, 3 K. & J. 608; 2 DeG. & J. 62; *Austin v. Tawney*, L. R. 2 Ch. 143; *Lord Ranelagh v. Melton*, 2 Dr. & Sm. 278; 10 Jur. (N. S.) 1141; *Weston v. Collins*, 11 Jur. (N. S.) 190; *Mason v. Payne*, 47 Mo. 517; *Potts v. Whitehead*, 5 C. E. Green, 55; *Kerr v. Purdy*, 51 N. Y. 629; *Fessler's Appeal*, 25 P. F. Smith, 483; *Westerman v. Means*, 2 Jones (Pa.) 97, 100; *Maughlin v. Perry*, 35 Md. 352, 360; *Jones v. Noble*, 3 Bush. 694; *Magoffin v. Holt*, 1 Duvall, 95; *Estes v. Furlong*, 59 Ill. 298, 300. In *Brook v. Garrod*, *supra*, Lord CRANWORTH said: "If the contract be that on the payment of 1,000*l.* at or before a specified day, a certain act shall be done on my part, I am at a loss to see why I can properly be called on to do the act if the money be not paid at the day; or why I should be compelled to perform not my contract, but another contract into which I have not entered." In *Jones v. Noble*, *supra*, the parties made this agreement: "This instrument in writing is to certify that I have this day sold to I. R. Shivell a certain tract of land, described in a deed now in my possession, and which is to be delivered to the said S. on the payment of \$3,000 on the 25th of December, 1863." Signed J. B. Jones. S. died before the day for payment, and soon after that day his administrator tendered the amount, and brought the suit on the next March for a specific performance. *Held*: "The payment of the price being a condition precedent to the transfer of the land, time was of the essence of the contract, and the plaintiff was not entitled to a specific performance." In *Kerr v. Purdy*, 51 N. Y. 629, the vendor had leased premises to plaintiff for five years, in which lease was a provision that the lessee might have the privilege of buying at any time within the first three years on payment of all arrears of rent and

SEC. 388. If, however, the offer or option contained in the unilateral contract is not made to depend upon an acceptance or payment at or before any particular or specified day, but simply calls for an assent and acceptance, or for a payment, as the case may be, and is silent with respect to the time within which such acceptance or payment must be made, then, so long as the offer remains unrevoked, it is enough that the acceptance or the payment be made within a *reasonable time*. In this form of the contract time is therefore *material*; a comparatively slight delay may end the vendee's right, but it is not in any true sense of the term *essential*. This difference between the forms of the unilateral contract, will serve to distinguish between and to reconcile some of the decisions which appear on their face to be conflicting. It does not, however, reconcile them all. It cannot be denied that there are authorities which squarely and positively hold, that even when the offer or option is made to depend upon payment of the price, or other act, being made at or before a specified day, time is non-essential, and that a failure to pay the money—or do the act—within the appointed period, does not necessarily prevent the party from tendering his performance afterwards, and enforcing the contract against the vendor.(1)

\$10,000. Lessee was in arrears, and did not tender the price within the three years, although he had made arrangements for procuring it. *Held*, that the lessee's right depended upon payment within the prescribed time, and when he suffered that to elapse, his right was ended, and he could not enforce a performance of the defendant's promise to convey. If the unilateral contract is sealed, and the common-law effect of a seal has not been taken away or changed by statute, it appears that the promissory offer contained in the writing cannot be recalled before the time for acceptance has expired. If such a covenant be that the covenantor will convey, if the covenantee pays the price on or before a specified day, and before that day arrives the covenantor conveys the land to a third person, the covenantee is not then bound to tender the price, because it would certainly be refused; he may sue for a specific performance at any time within the prescribed period, and it is enough if he is ready and willing to pay. *Kerr v. Purdy*, 50 Barb. 24; *Karker v. Haverly*, 50 Barb. 79; *Maughlin v. Perry*, 35 Md. 352; *Smoot v. Rea*, 19 Md. 406; *White v. Dobson*, 17 Gratt. 262.

(1) See cases *ante*, §§ 65, 67. *Bellinger v. Kitts*, 6 Barb. 273; *Jones v. Robbins*, 29 Me. 351; *Ewing v. Gordon*, 49 N. H. 444; *Barnard v. Lee*, 97 Mass. 92; *D'Arras v. Keyser*, 2 Casey, 249; *Perkins v. Hasdell*, 50 Ill. 216. If the vendor permits the vendee to have possession and to make valuable improvements on the land pending the time for payment, this would constitute another and different ground for relieving the purchaser from his default in payment, and in some of these cases such was the fact. In *Jones v. Robbins*, *supra*, a bond to convey by the vendor was conditioned to be void unless the price was paid at a day named; but the vendee was held entitled to pay afterwards, and compel a conveyance. In *D'Arras v. Keyser*, *supra*, a lease for a year contained a clause that the lessee

SEC. 389. 2. *Time, when made essential by express stipulation.*—In some earlier cases and *dicta* the opinion was judicially given, that it was impossible for the parties to make time essential by the most positive stipulation, unless there was something in its nature to give it that quality.(1) This opinion was founded upon a notion that there is an identity in equity in contracts for sale and in mortgages; that as a mortgage cannot, by means of any clause, be made *not* a mortgage, so as to cut off the rights of the mortgagee to redeem, so the vendee could not be deprived of his right to pay, or the vendor of his right to complete. Now it cannot be denied that, to a certain extent and for some purposes, there is a strong analogy between a mortgage and a contract for sale, and this analogy has been frequently recognized by the ablest judges.(2) But analogy is not identity, and it is now well settled that the resemblance between the two instruments is partial only, and does not go to the extent maintained by the earlier theory.(3)

should have the "privilege of buying the premises for the sum of \$2,575, at any time within twelve months from the date hereof," and "upon payment of the purchase-money" the lessor would give the deed of conveyance. The lessee did not tender the price until after the expiration of two years. The court, however, held that the lessee acquired an equitable right by the contract; that time was not essential, and that he was entitled to a specific performance. Per WOODWARD, J. "Mere default in the payment of money at a stipulated time admits, in general, of compensation, and hence time of payment is seldom treated as of the essence of real contracts. Parties may make it so by express agreement, but there is nothing on the face of this contract, or in the attending circumstances, to indicate the intention of those parties to make time essential." In *Barnard v. Lee*, 97 Mass. 92, vendor covenanted to convey if the vendee should "on or before the 1st of April" pay the price; vendee did not tender payment till May 25th, and did not account for the delay; it was held that time was not essential, and the vendee entitled to enforce performance. In both these two cases vendor suffered the vendee to take possession, and to remain in possession notwithstanding his default in payment.

(1) *Gibson v. Patterson*, 1 Atk. 12; and in *Gregson v. Riddle*, cited *arguendo*, by Mr. ROMILLY, 7 Ves. 268, there was a provision in the contract, that it should be void and of no effect unless the title was perfected at a certain day. Lord THURLOW held the clause inoperative; that it had often been attempted to get rid of agreements upon this ground, but never with success. Counsel for defendant urged that the intention of the parties was plain, and under the ruling of the chancellor it would be necessary to put in a clause to the effect that the contract should be void, if not completed in time, notwithstanding the decision of the court. Lord THURLOW replied, that this would not help the matter any; if such a clause were inserted, the parties would be just where they were without it.

(2) See *Seton v. Slade*, 7 Ves. 275, per Lord ELDON; *Hipwell v. Knight*, 1 Y. & C. Exch. 415, 416.

(3) See *Rummington v. Kelley*, 7 Ohio, 432; *Kirby v. Harrison*, 2 Ohio St. 326, 333, per THURMAN, J.

SEC. 390. The early doctrine, as laid down by Lord THURLOW, was doubted by Lord ELDON; (1) and wholly rejected by Lord KENYON who held the contrary. (2) It is now thoroughly established that the intention of the parties must govern, and if the intention clearly and unequivocally appears from the contract, by means of some express stipulation, that time shall be essential, then the time of completion or of performance, or of complying with the terms, will be regarded as essential in equity as much as at law. No particular form of stipulation is necessary, but any clause will have the effect which clearly and absolutely provides that the contract is to be void, if the fulfillment is not within the prescribed time. (3)

(1) In *Seton v. Slade*, 7 Ves. 270.

(2) *Mackreth v. Marlar*, 1 Cox, 259.

(3) In England it seems to be customary now to insert the clause, that either in respect to the whole agreement or in respect to some particular term, "time shall be of the essence of the contract." *Hudson v. Bartram*, 3 Mad. 440; *Lloyd v. Rippingale*, cited in 1 Y. & C. Ex. 410; *Honeyman v. Marryatt*, 21 Beav. 14, 24; *Baynham v. Guy's Hospital*, 3 Ves. 215; *Boehm v. Wood*, 1 J. & W. 419; *Williams v. Edwards*, 2 Sim. 78; *Hipwell v. Knight*, 1 Y. & C. Exch. 401, 416; *Nokes v. Lord Kilmorye*, 1 DeG. & S. 444; *Parkin v. Thorold*, 16 Beav. 59; *Gedye v. Duke of Montrose*, 26 Beav. 45; *Hudson v. Temple*, 29 Beav. 536; *Oakden v. Pike*, 34 L. J. (N. S.) Ch. (20); *Lloyd v. Collet*, 4 Bro. C. C. 469; *Benedict v. Lynch*, 1 Johns. Ch. 370; *Doar v. Gibbes*, 1 Bailey Ch. 371; *Wells v. Smith*, 2 Edw. Ch. 78; 7 Paige, 82; *Baldwin v. Van Vorst*, 2 Stockt. Ch. 577; *Bullock v. Adams*, 5 C. E. Green, 371; *Barnard v. Lee*, 97 Mass. 92; *Goldsmith v. Guild*, 10 Allen, 239; *Reed v. Breeden*, 11 P. F. Smith (61 Penn. St.) 430; *Jackson v. Ligon*, 3 Leigh, 161, 187; *Willis v. Forney*, 1 Busbee Eq. 256; *Kirby v. Harrison*, 2 Ohio St. 326, 332; *Scott v. Fields*, 7 Ohio 424; *Brewer v. Connecticut*, 9 Ohio, 189; *Heckard v. Sayre*, 34 Ill. 142; *Stow v. Russell*, 36 Ill. 18; *Steele v. Biggs*, 22 Ill. 643; *Kemp v. Humphreys*, 13 Ill. 573; *Smith v. Brown*, 5 Gilman, 309; *Notson v. Barrett*, 1 Greene (Iowa), 302; *Davis v. Stevens*, 3 Iowa, 158; *O'Fallon v. Kennerly*, 45 Mo. 124; *Grey v. Tubbs*, 43 Cal. 359; *Quinn v. Roath*, 37 Conn. 16; *Phelps v. Ill. Cent. R. R.*, 63 Ill. 468; *Morgan v. Bergen*, 3 Neb. 209; *Snider v. Lehnerr*, 5 Oreg. 385; *Peck v. Brighton*, 69 Ill. 200; *Kimball v. Tooke*, 70 Ill. 553. In *Benedict v. Lynch*, 1 Johns. Ch. 370, vendor contracted in March, 1810, to sell a tract of woodland to plaintiff, at so much per acre, payable in four yearly installments. It was stipulated that if the payments, or any of them, were not punctually made, the contract should be void. Vendee took possession, cleared several acres, but through misfortune was unable to make the payments. Vendor waited to the end of the second year, and then brought ejectment and recovered. Vendee, in fore part of 1814, tendered all the price, and sued for a specific performance. Court held that punctual payment was made essential by the clause of the contract. Also, that plaintiff's delay of three years in tendering the price was too great, in the absence of any proof that defendant had acquiesced in it. It should be remarked, that plaintiff's possession and improvements showed good faith on his part, and an intent not to abandon, and yet the court refused him any relief. (The question actually presented by this case was, whether time was material, and not whether it was essential. The decision



SEC. 391. Some of the cases cited in the note below which maintain the rule just stated, cannot easily be reconciled with other cases heretofore cited concerning relief against forfeiture from a non-performance at the prescribed time. In several of these cases, the court has confounded two very distinct matters, namely, time, as *essential*,

turned upon the vendee's great delay amounting to laches, and not upon his failure to pay on the very day appointed.) As CH. KENT's opinion is very instructive as a discussion of the general doctrine, I quote from it freely: "There was an express stipulation in this contract that if the plaintiff fails in either of his payments, the agreement was to be void. The first question that naturally presents itself is, whether time was not here made part of the essence of the contract, and whether the contract did not become void on the failure of the plaintiff to make the first payment in 1811." Referring to the early opinion of Lord THURLOW, he proceeds: "In other and later cases it has been admitted that parties may make the time of the essence of the agreement, so that if there be a default at the day without any just excuse, and without any waiver afterwards, the court will not interfere to help the party in default. The case is not analogous to that of a mortgage, where the only object of the security is the payment of the money, and not the transfer of the estate; and it seems to be conducive to the preservation of good faith and the rights of the parties, that if a contract of sale is expressly declared to be vacated on non-performance by a given day, that the courts should not interfere as of course to annul such a provision. The opinion of Lord LOUGHBOROUGH in *Lloyd v. Collett*, 4 Bro. C. C. 469; 4 Ves. 589, n. contains a strong and decisive argument on this point. He observes: 'There is nothing of more importance than that the ordinary contracts between man and man, which are so necessary in their intercourse with each other, should be certain and fixed, and that it should certainly be known when a man is bound and when he is not. There is a difficulty to comprehend how the essentials of a contract should be different in equity and at law. It is one thing to say that time is so essential, that, in no case in which the day has been by any means suffered to elapse, the court would relieve against it, and decree performance. The conduct of the parties, inevitable accident, etc., might induce the court to relieve. But it is a different thing to say that the appointment of a day is to have no effect at all; and that it is not in the power of the parties to contract that, if the agreement is not executed at a particular time, they shall be at liberty to rescind it. In most of the cases there have been steps taken. \* \* \* I want a case to prove that where nothing has been done by the parties, this court will hold, in a contract of buying and selling, a rule that the time is not an essential part of the contract. Here no steps had been taken from the day of the sale for six months after the expiration of the time at which the contract was to be completed. If a given default will not do, what length of time will do? An equity arising out of one's own neglect! it is a singular head of equity!' It would be impossible for me to add to the perspicuity and energy of this reasoning; and the Lord Chancellor in that case held, that as the vendor had omitted to complete a purchase for six months, being all that time in default, he was considered as having abandoned the contract; and he said there was no case where no step had been taken by the one party, and the other had immediately, when the time had elapsed, refused to perform the agreement, that a performance had been decreed. It may then be laid down as an acknowledged rule in courts of equity, that when the party who applies for a specific performance has omitted to execute his part of

and time, as *material* to the contract. The question presented by the facts and discussed by the opinions is really whether time was *material*, so that a delay would prevent the defaulting party from enforcing the agreement. Where a provision expressly making time essential in respect to the payment of the price *is inserted as a penalty*, it will

the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay, and where there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance. The rule appears to be founded in the soundest principles of policy and justice. Its tendency is to uphold good faith and punctuality in dealing. The notion that seems too much to prevail (and of which the facts of the present case furnish an example), that a party may be utterly regardless of his stipulated payments, and that a court of chancery will, almost at any time, relieve him from the penalty of his gross negligence, is very injurious to good morals, to a lively sense of obligation, to the sanctity of contracts, and to the character of this court. It would be against all my impressions of the principles of equity to help those who show no equitable title to relief." In *Wells v. Smith*, 7 Paige, 82, the contract was for the sale of a city lot, and contained a clause that, on or before a particular day, the vendee should build a house on the lot, or else should, on that day, pay \$1,000 as the first installment of the price; also, that if the vendee neglected or failed to perform any of the covenants therein contained at the times limited, all his right or interest in the premises, whether at law or in equity, should cease. The vendee did not build the house nor tender the price within the time prescribed, and on his suit for a specific performance, it was held that he could not recover. As this case is often referred to, I quote at some length from the opinion of Chancellor WALWORTH: "As to the power of the vendor or of the purchaser to make the performance of a condition precedent essential to the vesting of a legal or equitable right in the adverse party to a specific performance, I have no doubt, though this court may, perhaps, relieve against a forfeiture where it would be unconscientious to insist upon a strict and literal compliance. Thus, if a vendor, after he had received the greater portion of the purchase-money, should attempt to enforce a forfeiture of the money paid, under a stipulation that he might keep the whole amount thus received and the premises also, if the last payment was not made at the day, I am not prepared to say that this court would not interfere to compel him either to accept the last payment and convey the premises, or to restore the purchase-money already paid, after deducting a reasonable amount for the use of the premises in the mean time. \* \* \* Although, in theory, the interest is supposed to be a fair equivalent for the non-payment of money at the time agreed upon, we all know that in point of fact, the person to whom it is due frequently sustains great losses in consequence of the disappointment, which the legal rate of interest cannot compensate. On the other hand, it frequently happens that the perfecting of the title, and the delivery of the possession of the premises at the time contemplated by the purchaser, are of essential benefit to him, which cannot be compensated by damages which are ascertainable by the ordinary rules for computing damages. It would, therefore, not only be unreasonable, but entirely unjust, for any court to hold that parties, in making executory contracts for the sale or purchase of real estate, should not be permitted to make the time of performance an essential and binding part of the contract in equity as well as at law, where, as in this case, the other party was fully apprised of the intention to insist

be disregarded by a court of equity, and the vendee, although in default, will be relieved from the effect of the clause and from the forfeiture.(1)

SEC. 392. In order that time may be essential from the express provision of the agreement, the intent to make it so must be most clearly,

upon a strict performance at the day." In *Davis v. Stevens*, 3 Iowa, 158, a contract for sale of land was "on condition that he [the vendee] would pay promptly, time being of the essence of the contract," and it was held that his failure to pay on the prescribed day cut off his right to a specific performance against the vendor. The court also held that the vendee was bound to tender the price on the day named, without waiting for a demand by the vendor, and that the vendor was entitled to set up the purchaser's non-payment as a defense, although he had not tendered a deed or demanded payment of the price. In *Scott v. Fields*, 7 Ohio, 425, vendor contracted to sell the land to the vendee for \$831, \$100 down, \$200 on March 13, 1835, \$200 on June 13, 1835, and the balance on January 13, 1836. There was a provision that if vendee failed in making any of these payments in the above manner, he was to forfeit the first installment, and the contract was to be void. He went into possession and paid the first and second installments. He defaulted with the third installment, but afterwards tendered it, but the vendor refused to accept it, and said he was ready to refund the second one. At the time when the last installment became due, the vendee tendered all that was then due, third and fourth, with interest, which was refused. On a suit for a specific performance, held that "the parties had made time of the essence of the contract, and that the plaintiff had violated the agreement by failing to pay the third installment." The bill was therefore dismissed, but with a provision for refunding the second installment. In *Bullock v. Adams*, 5 C. E. Green, 371, the Chancellor of N. J. said: "Courts of equity do not in general consider the time of performance as of the essence of a contract for the sale of lands, but hold that it may become of the essence by being expressly made so by the contract itself (citing authority); or by notice from the other party, insisting upon performance at the time fixed, or from the subject-matter of the contract and its surroundings (citing *McKay v. Carrington*, 1 McLean, 50; *Holt v. Rogers*, 8 Pet. 420; *Levi v. Lindo*, 3 Meriv. 81; *Coslake v. Till*, 1 Russ. 376; *Young's Adm'n v. Rathbone*, 1 C. E. Green, 224)." In *O'Fallon v. Kennerly*, 45 Mo. 127, it was said by the court: "Relief may be given against a forfeiture arising from the breach of a stipulation that the contract shall be void if the money be not paid at the time prescribed; but that it will not be accorded except on some distinct and sufficient ground—as, for instance, that the purchaser went into possession and made valuable improvements, or paid a considerable portion of the price, or that the default was occasioned by the act of the vendor, or that he waived it by receiving part of the purchase-money, or where other circumstances render it inequitable to enforce the forfeiture."

(1) In *re Dagenham Dock Co.*, Ex parte Hulse, L. R. 8 Ch. 1022. A company agreed with the owner to purchase a lot for 4,000*l.* 2,000*l.* to be paid down and 2,000*l.* at a future day named, with a provision that if the whole 2,000*l.* and interest was not paid on that day, in which respect time was to be of the essence of the contract, the vendor might retake the land without repaying any part of the purchase-money already paid by the purchaser. Held, that this provision was a penalty, and the company in default should be relieved on payment of the balance of the purchase-price and interest.

unequivocally, and unmistakably shown by the stipulation. The prescribing a day at or before which, or a period within which, an act must be done, even with a stipulation that it shall be done at or before the day named, or within the period mentioned, does not render the time essential with respect to such act. It has been so held with reference to a stipulation for the payment of the price, or execution and delivery of the deed;(1) and to a stipulation in the contract that the abstract of title should be delivered on or before a particular day named, although the purchaser upon a failure to deliver on that day immediately refused to go on with the contract.(2)

(1) *Hearne v. Tenant*, 13 Ves. 287; *Parkin v. Thorold*, 16 Beav. 59; 2 Sim. (N. S.) 1; *Att'y-Gen. v. Purmort*, 5 Paige 620; *Wells v. Wells*, 3 Ired. Eq. 596; *Runnels v. Jackson*, 1 How. (Miss.) 358; *Hoyt v. Kimball*, 49 N. H. 322; *Barnard v. Lee*, 97 Mass. 92; *Quinn v. Roach*, 37 Conn. 17; *Viele v. Troy & Boston R. R.*, 21 Barb. 381; *Duffy v. O'Donovan*, 46 N. Y. 223; *Hubbell v. Van Schoening*, 49 N. Y. 326; *D'Arras v. Keyser*, 2 Casey, 249; *Remington v. Irwin*, 2 Harris, 143; *Jackson v. Ligon*, 3 Leigh, 161, 187; *Morgan v. Herrick*, 21 Ill. 481; *Hall v. Delaplaine*, 5 Wisc. 206; *Matthews v. Gillis*, 1 Clark (Iowa), 242; *Brashier v. Gratz*, 6 Wheat. 528, 533. In *Remington v. Irwin*, *supra*, COULTER, J., said: "I am unable to perceive that time is made essential by the terms of the contract. The first installment was, it is true, to be paid by the vendee on the 1st of October, 1848, when a title free of incumbrance was to be conveyed by the vendor. This, however, is nothing more than a naked covenant to pay money at a particular day, which I apprehend has never been held to make time of the essence of the contract, for the plain reason that it admits of adequate compensation ascertained by law in the shape of interest. *De Camp v. Feay*, 5 S. & R. 328." But see *Grey v. Tubbs*, 43 Cal. 359, and other cases cited, *ante*, §§ 335, 336, 380, 390. The doctrine in regard to the stipulations concerning time, which render it essential, as settled by the weight of authority in accordance with the equitable principle of relieving against forfeitures, was admirably summed up by the court of Connecticut, in the case of *Quinn v. Roath*, 37 Conn. 16, and this grand principle relating to forfeitures has been evidently lost sight of in some of the cases heretofore cited, in which the decision has been placed upon the very letter of the contract. The doctrine that a court of equity "will never make a new contract for the parties" if generally applied in the manner in which it has sometimes been, would at one blow abolish a large part of the equity jurisdiction concerning forfeitures and penalties. The court held in the case of *Quinn v. Roath*, that every agreement as to time is not essential, and every failure of the plaintiff in respect thereto, will not defeat his right to a specific performance. In order that the stipulation may be of such an essential nature that its non-fulfillment will be a defense, it must either be in its terms or by its intrinsic character a condition precedent to the plaintiff's enforcement of the contract; or it must be such as on its non-fulfillment, without reasonable excuse, will in terms render the contract void; or it must, in some other manner—through fraud, mistake, surprise, bad faith, unreasonable delay, gross neglect, or other plain unconscientiousness—make it inequitable that the plaintiff should enforce the contract; and see *McClartey v. Gokey*, 31 Iowa 505.

(2) *Roberts v. Berry*, 16 Beav. 31; 3 DeG. M. & G. 284, 292.

SEC. 393. Returning to the stipulations which make the time of payment essential, if the clause be not absolute that the contract shall be *ipso facto* void upon a default in payment at the time, but its object and its language are to give the vendor his election and power to put an end to the agreement upon the vendee's failure in paying at the appointed day, then the vendor, if he intends to avail himself of the provision, must give the purchaser a timely and reasonable notice of his intention to avoid the contract, or must do some unequivocal act which unmistakably shows that intention, for the vendor cannot treat the default alone as terminating the agreement.(1) American cases hold that the vendor must also, when he elects to rescind the contract on this account, repay or tender the purchase-money received, and return the collateral securities given to him by the vendee.(2) A formal notice by the vendor may not, perhaps, be always necessary, for it is declared, in some decisions, that any act of the vendor, of which the purchaser is or must, in the nature of things, be informed—showing clearly and unequivocally that the vendor has elected to rescind the agreement, or to treat it as at an end—will

(1) *Young v. Daniels*, 2 Iowa 126; *Armstrong v. Pierson*, 5 Iowa, 317.

(2) *White v. Butcher*, 6 Jones Eq. 231; *Converse v. Blumrich*, 14 Mich. 109, 115; *Morris v. Hoyt*, 11 Mich. 9; *Young v. Daniels*, 2 Iowa, 126; *Armstrong v. Pierson*, 5 Iowa, 317; *Murphy v. Lockwood*, 21 Ill. 611, 620; *Hechard v. Sayre*, 34 Ill. 142; *Chrisman v. Miller*, 21 Ill. 236; *Thompson v. Bruen*, 46 Ill. 125; *Staley v. Murphy*, 47 Ill. 244, per LAWRENCE, J.: "There are, undoubtedly, cases where the purchaser has been guilty of gross laches, in which the vendor would be justified in re-selling to a third person, without first tendering to the first purchaser the money paid, either holding it subject to his order, or until the equities between them, growing out of the contract and its violation by the purchaser, can be adjusted. (*Thompson v. Bruen*, 46 Ill. 125.) But while the money paid need not be returned in every case, as a preliminary to the rescission of a contract for non-performance by the vendee, the unpaid negotiable notes must always be either returned or canceled, so that they cannot be negotiated, and their payment be enforced. As was said by the court in *Chrisman v. Miller*, 21 Ill. 236, the vendor who rescinds must place himself in a position where he cannot enforce the contract as against the vendee. He cannot be permitted to retain the notes with the power of negotiating them to innocent purchasers, and at the same time insist that the contract is terminated, and the rights of the vendee extinguished." In *Phelps v. Illinois Central R. R.*, 63 Ill. 468, the contract was peculiar, containing this stipulation: "In case the party of the second part shall fail to make the aforesaid payment punctually, this contract shall become utterly null and void, and all right under it shall cease, and the premises shall revert to the party of the first part without any re-entry or declaration of forfeiture." The court held, purporting to follow the opinion of WALWORTH, Ch., in *Wells v. Smith*, that the vendor could treat the contract as ended, on default in payment, without notifying the vendee or returning the notes given for the price. This is certainly a harsh decision, and little in accordance with the true spirit of equity

operate the same as and take the place of a notice of such intention to the vendee; but the act, in order to produce this effect, must be wholly inconsistent with a continuance of the contract.(1)

SEC. 394. Wherever time is made essential either by the nature of the subject-matter and object of the agreement, or by express stipulation, or by a subsequent notice given by one of the parties to the other, the party in whose favor this quality exists—that is, the one who is entitled to insist upon a punctual performance by the other or else that the agreement be ended—may waive his right and the benefit of any objection which he might raise to a performance after the prescribed time, either expressly or by his conduct; and his conduct will operate as a waiver when it is consistent only with a purpose on his part to regard the contract as still subsisting, and not ended by the other party's default.(2)

SEC. 395. 3. *Time made essential by a subsequent notice by one of the parties.*—As the doctrine that time is not essential in the performance of a contract may sometimes work injustice, and be used as the excuse

(1) The court of Illinois has gone so far as to hold that a sale of the land to a third person, although not communicated to the vendee, is such an act. *Fitch v. Boyd*, 55 Ill. 307, 309; *Chrisman v. Miller*, 21 Ill. 227, 236. A sale made to a third person, if the vendee is immediately informed of the fact, might satisfy all the conditions of the rule, and would, I think, be an act in the highest degree, inconsistent with the continuance of the former contract, and so might take the place of a notice; but I cannot think that a sale made privately, without the vendee's knowledge, ought to have the effect of terminating the contract. In other words, unless the vendee delays *after* being informed of the sale, his rights should not, in my opinion, be regarded as necessarily cut off by the sale. In regard to the surrender of securities by the vendor, upon his electing to rescind, the Illinois courts have held, that he is not bound to surrender or cancel the negotiable notes given for the price, if the rescission is made *after* they have matured and fallen due; because after that time the vendee is in no danger of being made liable upon them in the hands of a *bona fide* transferee. If they should be transferred and sued upon by the indorsee, the vendee (maker) would always have a good defense on them, viz., that the contract having been rescinded by their original payee, their consideration had wholly failed. *Phelps v. Illinois Cent. R. R.*, 63 Ill. 468, 476; *Fitch v. Boyd*, 55 Ill. 307.

(2) In *Seton v. Slade*, 7 Ves. 265, the vendee had notified the vendor that the title must be completed at a certain day, or he should treat the contract as ended; his acceptance of the abstract, without objection, so late that the title could not be perfected by the day, was held a waiver. *Boehm v. Wood*, 1 J. & W. 420; *Levy v. Lindo*, 3 Meriv. 81; *Hunter v. Daniel*, 4 Hare, 420; *Parkin v. Thorold*, 16 Beav. 59, 69, 71; *Wells v. Maxwell*, 32 Beav. 408; *Webb v. Hughes*, L. R. 10 Eq. 281. In *Upperton v. Nickolson*, L. R. 6 Ch. 436, time was made essential in respect to the stipulation as to the vendee's objecting to the title; held, that vendor's delay in delivering the title-papers—the abstract—excused the vendee's delay in making the objections.

for unwarrantable laches, the following rule was introduced at a comparatively late period, and is now firmly settled, which prevents the doctrine from being abused by the neglect or willfulness of either party. If either the vendor or the vendee has improperly and unreasonably delayed in complying with the terms of the agreement on his side, the other party may, by notice, fix upon and assign a reasonable time for completing the contract, and may call upon the defaulting party to do the acts to be done by him, or any particular act within this period. The time thus allotted then becomes essential, and if the party in default fails to perform before it has elapsed, the court will not aid him in enforcing the contract, but will leave him to his legal remedy.(1)

SEC. 396. The notice cannot be an arbitrary and sudden termination of the transaction; it cannot put an immediate end to a pending dispute or negotiation as to the title; it must allow a reasonable length of time for the other party to perform, and if it fails in any of these respects, it may be disregarded, and will produce no effect upon the equitable remedial rights of the party to whom it is given.(2) The nature and object of the contract, the circumstances of the case, and the previous conduct of the parties, are important, and, indeed, controlling elements in determining the reasonableness of the notice.(3)

(1) *Reynolds v. Nelson*, 6 Mad. 18; *Taylor v. Brown*, 2 Beav. 180; *Benson v. Lamb*, 9 Beav. 502; *Nokes v. Lord Kilmorey*, 1 DeG. & Sm. 444; *King v. Wilson*, 6 Beav. 126; *Heaphy v. Hill*, 2 S. & S. 29; *Watson v. Reid*, 1 Russ. & My. 236; *Walker v. Jeffreys*, 1 Hare, 341; *Pegg v. Wisden*, 16 Beav. 239; *Parkin v. Thorold*, 16 Beav. 59; *Macbryde v. Weeks*, 22 Beav. 533; *Gordon v. Mahony*, 18 Ir. Eq. 404; *Morgan v. Gurley*, 1 Ir. Ch. 482, 495; *Eads v. Williams*, 4 DeG. M. & G. 674; *Nott v. Riccard*, 22 Beav. 307; *Rogers v. Sanders*, 16 Me. 92; *Wiswall v. McGowan*, 1 Hoff. Ch. 125; *Hatch v. Cobb*, 4 Johns. Ch. 559; *Jackson v. Ligon*, 3 Leigh, 161; *Thompson v. Dulles*, 5 Rich. Eq. 370; *Rummington v. Kelley*, 7 Ohio, 432; *Smith v. Lawrence*, 15 Mich. 499; *Brashier v. Gratz*, 6 Wheat. 523; *Reed v. Breeden*, 61 Pa. St. 460.

(2) Thus, where a negotiation was pending concerning the vendee's objections to the vendor's title, a notice by the vendee calling upon the vendor to complete, within one month, or the contract would be ended, was held unreasonable. *Wells v. Maxwell*, 32 Beav. 408; 11 W. R. 842. In another case six weeks was held unreasonably short for the vendee to complete. *Pegg v. Wisden*, 16 Beav. 239; and fourteen days an unreasonable time for the vendors to perfect title and complete. *Parkin v. Thorold*, 16 Beav. 59. See, also, *Taylor v. Brown*, 2 Beav. 180; *King v. Wilson*, 6 Beav. 124; *McMurray v. Spicer*, L. R. 5 Eq. 527; *Webb v. Hughes*, L. R. 10 Eq. 286; *Tiernan v. Roland*, 3 Harris, 429, 431; *Wiswall v. McGowan*, 1 Hoff. Ch. 125, 139.

(3) As examples, in *Nott v. Riccard*, 22 Beav. 307, it was said that where the vendor had previously refused to remove an objection to his title, a notice might be reasonable, which if given in the first instance, calling upon him to remove, would

The notice, also, to be effectual in making the time allotted an essential element of the performance, must be express, clear, distinct and unequivocal.(1)

SEC. 397. After time has been thus made an essential element of the contract, by a reasonable notice given during the negotiation concerning its performance, the notice and its effect may be waived by the conduct of the party giving it; and if the time is once allowed to pass, and the parties still go on negotiating for the completion of the purchase, this conduct amounts to a waiver, and time is then no longer essential.(2) When the fact of notice having been given is set up in defense, it seems a verbal notice is sufficient; but when set up by the plaintiff, that it must be in writing.(3)

SEC. 398. Whenever time is an essential element of the contract, either being originally so, or being engrafted upon the agreement by means of a notice, and the purchaser does not receive possession of the land at the time stipulated in the contract for its delivery, but afterwards obtains a decree for specific performance, he is entitled to compensation for the loss he sustained from the delay.(4)

have been unreasonably short. In *Stewart v. Smith*, 6 Hare, 222, a notice to rescind was waived in case vendor produced evidence of his title immediately; he failed to produce it, and his suit brought to enforce the contract was dismissed, the notice being held proper. In *Macbryde v. Weekes*, 22 Beav. 533, the nature of the contract requiring haste, a notice of one month to the vendor within which to complete, was held reasonable, although more than nine (9) weeks had already elapsed; and a peremptory notice that the contract is immediately at an end, it has been said is sufficient, where the party notified acquiesces or does not ask for any time (but *qu.* as to the last). See *Mann v. Dunc.* 2 Ohio St. 187.

(1) In *Reynolds v. Nelson*, 6 Mad. 18, a notice by one party that he would consider the non-performance by the other by a certain day, as equivalent to a refusal to perform the contract, was held not a sufficiently express notice to make time essential, and to authorize the party giving it to rescind.

(2) *Webb v. Hughes*, L. R. 10 Eq. 286, per MALINS, V. C., who said, in addition: "A purchaser, however, is not bound to wait an indefinite time, and if he finds, while the negotiations are going on, that a long time will elapse before the contract will be completed, he may, in a reasonable manner, give notice to the vendor, and fix a period at which the business is to be terminated. But having once gone on negotiating beyond the time fixed, unless the negotiations were without prejudice (*Tilley v. Thomas*, L. R. 3 Ch. 61), he is bound not to give immediate notice of abandonment, but must give a reasonable notice of his intention to give up his contract if a title is not shown." As to waiver of notice by subsequent continued negotiation, see *Prothro v. Smith*, 6 Rich. Eq. 324.

(3) *Nokes v. Lord Kilmorey*, 1 DeG. & Sm. 444, 458. Verbal statements that time was to be essential, made by the vendee's agent at the time of concluding the contract, were admitted in evidence on part of defendant for purpose of showing notice.

(4) *Gedye v. Duke of Montrose*, 26 Beav. 45. Agreement for the sale of a lease, "with possession on the first of December, the rent to commence at Christmas."



SEC. 399. *III. Time, when material.*—Much confusion has undoubtedly arisen, in the minds of both judges and text-writers, from failing to distinguish between the rules of time as essential, and the rules pertaining to time considered as material. In judicial opinions, which profess to deal with time as of the essence of the contract, we may find long discussions upon the effect of unreasonable delay, and what circumstances will excuse the delay; whereas, if time is of the essence, no question of *delay* or of *laches*, using these words with any regard to their true meaning, can properly arise. If time is essential, the stipulation of the contract must be exactly complied with; not the *delay*, but failure to perform at the exact day, cuts off the rights of the defaulting party.

SEC. 400. There are, in fact, three different aspects or conditions in which time is to be viewed in respect to the performance of contracts in equity. 1. In the first and lowest, time may with propriety be called *immaterial*. In the cases and under the special circumstances which belong to this division, delay can hardly be said to impair the rights of a party to enforce performance; or, at all events, delay, although extremely long continued, is most easily excused—excused by facts which under other circumstances would furnish no ground whatever of excuse, such as the pecuniary inability of the party in default, the difficulty of perfecting title, and the like; and in many of the cases heretofore cited, no facts were shown which could be called a legal or equitable excuse. Of course, in order that time should be thus immaterial, the circumstances should be special. Where the purchaser has received the equitable title, has obtained the possession of the land, has been in the enjoyment of its rents and profits, has paid the price, and nothing remains to be done to complete the contract except the conveyance of the legal title, and nothing has happened which rendered the want of the legal title injurious or detrimental to the vendee, a delay in conveying the legal title, though lasting through many years, and without any excuse of real difficulty in the way, has been repeatedly held to be no impediment to a decree of specific performance. The same is true where the delay has been in completing the payment, provided there has been no substantial change in the circumstances and relations of the parties during the interval, and the interest will constitute not only a theoretical, but an actual compensation for the purchaser's default in

By vendor's default possession was not given until January 31. *Held*, per Sir JOHN ROMILLY, M. R., that the vendee was entitled to compensation.

payment. Many of the cases cited in the first subdivision of the present section, illustrating the general doctrine that time is not essential, are examples of the immateriality which I am now describing. Of course, it is not to be understood, that even in these cases, a court of equity pays absolutely no attention to the lapse of time. Time of performance is so immaterial, that delay is excused by comparatively trifling circumstances, which account for the default, but which are not any legal grounds for departing from the literal terms of the contract, and which would not be accepted as sufficient by a court of equity in a case where time was regarded as *material*.

SEC. 401. At the opposite extreme is the aspect of time as of the essence of the contract. Whenever time is essential, *delay, as such*, is never to be taken into account; that is, the party in default does not lose his right to enforce the agreement, simply because he *delayed* in the performance, but because he failed to comply with its terms literally and exactly upon the very day when the act was required to be done according to his stipulation. If time is of the essence of the contract, then the whole agreement with all its rights and obligations turn upon a performance at the very appointed day. A neglect for twenty-four hours is as truly a breach, as a neglect for a month or a year. In short, if time is essential, the same strict rule prevails in equity as at law, and the party who has stipulated to do an act at a specified time, must do it at that time, or he loses all his remedial rights in a court of equity as well as in a court of law. No such circumstances will excuse his failure and preserve his rights, as will avail to account for his delay in a case where time is simply *material*. Nothing will serve as an excuse, except the same class of events beyond the reach of human control, which will dispense with an exact performance of any term of any contract—such event as an act of God, or perhaps an inevitable accident—or such events as will furnish a ground in equity for discharging the obligation of all agreements, such as fraud or substantial mistake, or the default or procurement of the other party.

SEC. 402. Occupying a position between these extremes, is the third aspect under which time may be viewed—that is, as *material* to the contract. When time is simply *material*, and not essential, delay is a most important element affecting the remedial right, and the question to be examined and determined in every case of delay is, whether it was reasonable or unreasonable—or, in other words, whether it can be sufficiently accounted for and excused, or whether it was without excuse, and therefore constitutes the *laches* which is

fatal to the obtaining the equitable relief. If time is material a failure to comply with the terms of the contract is not *necessarily* a bar to an enforcement; but it throws upon the defaulting party the burden of explaining his neglect and of satisfying the court that, notwithstanding the failure, a denial of the remedy to him would be inequitable. Certain conditions must, therefore, be met and fulfilled by the party who asks the aid of the court in the face of his delay. In the first place, the delay must not have been too long; and what is reasonable or unreasonable in point of duration must depend very largely upon the circumstances of each case, and especially upon the cause or occasion of the delay. A delay resulting even from inevitable accident may be so long, that it would be inequitable to enforce performance upon the other party. In the second place, the delay, whether long or short, must be accounted for and explained by facts and circumstances which are regarded by courts of equity as sufficient to justify and excuse it. The cause of a delay may be of the most peremptory character, making it absolutely impossible for the defaulting party to have performed any sooner, and yet it may not be of a kind which a court of equity will accept as sufficient to excuse the failure. For example, when the time of payment is material, and the purchaser is delayed in making his payments by his own pecuniary inability—an inability which existed when he entered into the agreement, and which he had no reason to suppose would be removed before the day for his performance arrived—this fact may explain the delay and may even prove that it was inevitable, but it would not be accepted by a court of equity as sufficient excuse and justification to entitle the vendee to a decree against the vendor. In treating the subject of time considered as *material* in performing a contract, the practical question to be answered is, when is the delay reasonable and excused, so that the defaulting party shall be entitled to relief, and when is it unreasonable, and amounting to *laches*, so as to defeat the right to the remedy of specific performance?

SEC. 403. 1. *Where the delay is caused solely by the acts or omissions of either party.*—Although time is not ordinarily essential, yet, as a general rule, it is material. Except in the comparatively few cases where time is immaterial, and delay, however long, is hardly of any consequence, the doctrine is familiar and fundamental that a party seeking the remedy of specific performance as the actor (as plaintiff in an action, or as defendant setting up a counter-claim), and, also, the party who desires to maintain an objection, founded upon the other's *laches*, must show himself, in the language of many judges, to have been “ready,

desirous, prompt, and eager.”(1) Mere lapse of time, without any other circumstances of default in conforming with the terms of the contract, may defeat a specific performance, for a court of equity, even when equitable rights of action are not embraced within the statute of limitations, will not enforce stale demands, nor aid parties who have long slumbered upon their remedial rights.(2)

(1) *Lloyd v. Collett*, 4 Bro. C. C. 469; 4 Ves. 690; n.; *Harrington v. Wheeler*, 4 Ves. 686; *Guest v. Homphrey*, 5 Ves. 818; *Alley v. Deschamps*, 13 Ves. 225; *Walker v. Jeffreys*, 1 Hare, 352; *Southcomb v. Bp. of Exeter*, 6 Hare, 213, 218; *Dorin v. Harvey*, 15 Sim. 49; *Alloway v. Braine*, 26 Beav. 575; *Sharp v. Wright*, 28 Beav. 150; *McMurray v. Spicer*, L. R. 5 Eq. 527, 537; *Rogers v. Saunders*, 16 Me. 98; *Ely v. McKay*, 12 Allen, 323; *Sullings v. Sullings*, 9 Allen, 234; *Van Zandt v. New York*, 8 Bosw. 375; *Delavan v. Duncan*, 49 N. Y. 485; *Peters v. Delaplaine*, 49 N. Y. 362; *Bullock v. Adams*, 5 C. E. Green, 367; *Thorp v. Pettit*, 1 C. E. Green, 488; *Earl v. Halsey*, 1 McCarter, 332; *Dubois v. Baum*, 10 Wright, 537; *Bellas v. Hays*, 5 S. & R. 427; *Kirby v. Harrison*, 2 Ohio St. 326; *Ludlow v. Cooper*, 13 Ohio, 552; *Rummington v. Kelley*, 7 Ohio, 432, 437; *Higby v. Whittaker*, 8 Ohio, 198; *Bennett v. Welch*, 25 Ind. 140; *O’Kane v. Kiser*, 25 Ind. 168; *McCulloch v. Dawson*, 1 Ind. 413; *McClellan v. Darraph*, 50 Ill. 249; *Fitch v. Boyd*, 55 Ill. 307; *Anderson v. Frye*, 18 Ill. 94; *Booten v. Scheffer*, 51 Gratt. 474, 491; *Breckenridge v. Clinkinbeard*, 2 Litt. 127; *Gentry v. Rogers*, 40 Ala. 442; *De Cordova v. Smith*, 9 Tex. 129; *Glasscock v. Nelson*, 26 Tex. 150; *Moot v. Scriven*, 33 Mich. 500 (a delay of vendee held not to defeat his right); *Leaird v. Smith*, 44 N. Y. 618 (delay excused); *Van Campen v. Knight*, 63 Barb. 205 (ditto); *Morgan v. Bergen*, 3 Neb. 239 (ditto); *Allen v. Atkinson*, 21 Mich. 351 (vendee when entitled to a reasonable delay); *Haughwout v. Murphy*, 6 C. E. Green, 118; *Lawrence v. Lawrence*, *ib.* 317; *Merritt v. Brown*, *ib.* 401; *Howe v. Rogers*, 32 Tex. 218; *Campbell v. Hicks*, 19 Ohio St. 433; *Hubbell v. Van Schoening*, 58 Barb. 498; 49 N. Y. 326 (cases in which plaintiff’s laches were fatal to his recovery); *Eppinger v. McGreal*, 31 Tex. 147 (long delay of vendee fatal); *Mix v. Balduc*, 78 Ill. 215; *Peck v. Brighton Co.*, 69 Ill. 200; *McDermid v. McGregor*, 21 Minn. 111 (vendee’s unexcused delay of a few months held to defeat his recovery); *Ritson v. Dodge*, 33 Mich. 463 (vendee’s delay of thirty years fatal); *Norris v. Knox*, 1 Pittsb. 56 (delay of thirty-four years ditto); *Delavan v. Duncan*, 49 N. Y. 485 (vendor’s delay of three years and six months fatal); *Finch v. Parker*, 49 N. Y. 1 (vendee’s delay of three years fatal); *Mason v. Owens*, 56 Ill. 259; *Hawley v. Jelly*, 25 Mich. 94 (unexcused delay of vendee); *McLaurin v. Barnes*, 72 Ill. 73 (ditto); *Roby v. Cossitt*, 78 Ill. 638 (great delay of vendee); *Taylor v. Merrill*, 55 Ill. 52; *Fitch v. Boyd*, *ib.* 307 (vendee must not unreasonably delay); *Brown v. Covillaud*, 6 Cal. 566; *Pearis v. Covillaud*, 6 Cal. 617; *Green v. Covillaud*, 10 Cal. 317; *Weber v. Marshall*, 19 Cal. 447; *Steele v. Branch*, 40 Cal. 3; *Williams v. Hart*, 116 Mass. 513 (delay of twenty years); *Boyd v. Schlessinger*, 59 N. Y. 301, 305 (vendee had not only delayed, but on vendor’s offer to perform had refused to complete, and these acts were held to defeat his claim when he subsequently sued for a specific enforcement); *Davison v. Associates of the Jersey Co.*, 6 Hun, 470, and cases cited.

(2) *Delavan v. Duncan*, 49 N. Y. 485; *Peters v. Delaplaine*, 49 N. Y. 362; *Eyre v. Eyre*, 4 C. E. Green, 102; *Cadwalader’s Appeal*, 7 P. F. Smith, 158; *Nelson v. Hagerstown Bank*, 27 Md. 51; *Kirby v. Harrison*, 2 Ohio St. 326; *Anderson v.*

SEC. 404. In determining what amount of mere delay in bringing his suit will defeat the plaintiff's claim to a specific performance; or, in other words, what lapse of time, after his right of action accrued, will render the demand stale—the rule prevails in equity as in law, that while the plaintiff is in possession under an assertion and exercise of right, the lapse of time does not prejudice his remedial right. If the vendee, therefore, takes and retains possession of the premises with the vendor's consent, his mere delay in bringing a suit, or even

Fry, 18 Ill. 94; Fitch v. Boyd, 55 Ill. 307; Johnson v. Hopkins, 19 Iowa, 49; Conway v. Kinsworthy, 21 Ark. 9; Eppinger v. McGreal, 31 Tex. 147. In *Anderson v. Fry*, *supra*, the vendor delayed more than two years after being paid, before offering to convey, and this delay was held to be *laches*, which was a bar to his obtaining a specific performance, and to his restraining, by injunction, an action at law by the vendee to recover back the purchase-money. In *Kirby v. Harrison*, time was not essential, but the vendee's failure to pay at the day, and his subsequent failure to pay in compliance with a demand by the vendor, were held to bar his right to a specific performance, although the vendor's demand was not accompanied with any notice of rescission in case of non-payment at the time specified in the demand. The delay which may thus constitute a fatal *laches*, may be either, (1), in not performing the terms of the agreement; or (2), in not bringing a suit to enforce one's remedial right; or (3) in not prosecuting the suit with diligence after it is brought. See *Moore v. Blake*, 1 Ball & B. 62. In *Milward v. Earl Thanet*, 5 Ves. 720, n., Lord ALVANLEY used the language so often repeated by other judges: "A party cannot call upon a court of equity for specific performance unless he has shown himself ready, desirous, prompt, and eager." But in *Eads v. Williams*, 4 DeG. M. & G. 691, the rule was stated by Lord CRANWORTH in a manner not quite so rhetorical, but, perhaps, more accurate: "Specific performance is relief which this court will not give, unless in cases where the parties seeking it come as promptly as the nature of the case will permit." The following are examples taken from actual decisions which illustrate the doctrine better than any general explanation can do. In *Marquis of Hertford v. Boore*, 5 Ves. 719, the plaintiff's delay of fourteen months did not prevent his obtaining a decree; in *Eads v. Williams*, 4 DeG. M. & G. 674, a delay of three years and a half prevented a decree; in *Southcomb v. Bp. of Exeter*, 6 Hare, 213, a delay from January 17, 1842, to August 30, 1843, and in *Lord James Stuart v. London & N. W. Ry. Co.*, 1 DeG. M. & G. 721, a delay from October, 1848, to July, 1850, were held fatal. See, also, *Thomas v. Blackman*, 1 Coll. C. C. 301; *Guest v. Homfray*, 5 Ves. 818; *Harrington v. Wheeler*, 4 Ves. 686; *Spurrier v. Hancock*, 4 Ves. 667. In *McMillin v. McMillin*, 7 Monr. 560, a delay of five years in suing, the plaintiff not having been in possession, was held a bar to a specific performance of a contract for sale of land; in *Osborne v. Bremar*, 1 Dessaus. 486, vendor's delay of three years in making title was held not to prevent his obtaining a decree; while in *Haffner v. Dickson*, 2 Har. & J. 46, the plaintiff's delay of twenty-seven years in bringing suit was held not to bar his right to a specific performance. In these American cases the mere lapse of time after the right of action accrued, before filing the bill, was set up as a defense, by analogy to the statute of limitations at law, and the question of the plaintiff's delay in fulfilling the terms of the contract on his part, was not the gist of the defense. See, also, cases cited in the last note.

in paying the price, will not prevent him from compelling a conveyance upon a subsequent payment or tender of the amount due; nor will his right to the relief be cut off until the vendor places a limit to the lapse of time by a demand of payment at or before a specified day, and by a notice that the agreement will be rescinded unless the demand is complied with, and the vendee's default thereon.(1) The defendant, in order to avail himself of the plaintiff's delay as a defense, must have performed, or been ready and willing to perform, all the terms of the contract on his own part.(2)

Where the contract is substantially executed, the purchaser has obtained possession, and of course is vested with an equitable title, but the legal title is yet held by the vendor, the vendee's delay in bringing a suit to compel a conveyance, however long continued, will not defeat his remedy of a specific performance, unless perhaps the situation of the vendor and his relations to the land have been so altered in the meantime that a specific execution of the agreement will be inequitable.(3)

(1) *Ely v. McKay*, 12 Allen, 323; *Schmidt v. Livingstone*, 3 Edw. Ch. 213; *Dubois v. Baum*, 10 Wright, 537; *Williams v. Staake*, 2 B. Mon. 196; *Mason v. Wallace*, 4 McLean, 77. But the vendee's mere possession of the land, without payment of the price, will not prevent the statute of limitations from running against his right of action, if it has accrued, at least under the statute of New York. *McCotter v. Lawrence*, 6 T. & C. 392; 4 Hun, 107. As illustrations of the text, see, also, *Green v. Finin*, 35 Conn. 178; *Stretch v. Schenck*, 23 Ind. 77.

(2) *House v. Beatty*, 7 Ohio, 417, per Wood, J., *held*, that "to entitle defendant to rely on the staleness of the plaintiff's claim, it must appear that he (defendant) performed, or was ready and willing to perform, all the substantial conditions precedent on his part, and that the plaintiff omitted some duty or obligation resting on him, and then, if the plaintiff suffered an unreasonable time to elapse without making good his default, the court might infer that he had waived or relinquished his right."

(3) The cases on this point are very strong. In addition to those cited in the previous notes: *Crofton v. Ormsby*, 2 Sch. & Lef. 604, per Lord REDESDALE. In case of one who makes a contract for a lease as tenant, who takes possession, pays his rent, and has all the enjoyment of the premises given by the agreement, his delay in suing to compel an execution of the lease will not prejudice his right to that relief, *Clarke v. Moore*, 1 Jon. & Lat. 723; *Sharp v. Milligan*, 22 Beav. 606; in *Burke v. Smythe*, 3 Jon. & Lat. 193, plaintiff had contracted for the lease of a shop and the purchase of the stock in trade; had paid for the stock, gone into possession of the shop, and paid the rent, but vendor had refused to execute the lease on some frivolous ground—held, that plaintiff's delay was no defense to his demand for a specific enforcement. In *Shepherd v. Walker*, L. R. 20 Eq. 659, the same rule was applied against the tenant. At the expiration of his lease in July, 1857, the tenant signed an agreement with the lessor to take a new lease for thirty-one years, at the same rent, and on the payment of 600*l.* at the day fixed for completion, viz., August 1, 1857. A draft lease was sent to

SEC. 405. In accordance with the rule that a defendant who desires to rely upon the plaintiff's delay as a ground for defeating the suit, must himself have been ready, willing, and prompt, it follows that a defendant can never take advantage, as a defense, of a delay which he himself has caused.(1)

SEC. 406. The naked fact that a period of time greater or less in

the tenant for his approval, but was never executed nor returned by him, and the lessor took no further steps, Tenant continued in possession, and paid rent at the old rate, but did not pay the 600*l.*, nor any interest thereon. In 1871 the lessor died, and his personal representatives filed this bill for a specific performance. *Held*, the lapse of time—more than fourteen years—was no defense, and tenant was obliged to perform his agreement, and pay the 600*l.*, and interest from August 1, 1857. In *Moss v. Barton*, L. R. 1 Eq. 474, an agreement to let a house for three years contained a stipulation that the landlord would, at the request of the tenant, grant him a further lease of the premises at the same rent, for a term of either five, seven, fourteen, or twenty-one years from the expiration of the previous three years holding, and the tenant stipulated to keep the premises in repair. The tenant delayed until four years after the expiration of the original three years, and then sued for a specific performance, having continued in possession, paying rent all the time. *Held*, the tenant was entitled to a decree for the specific performance of the contract for a further lease, notwithstanding his delay; also, that his making an application to the landlord two years previously to his suit for a lease at a reduced rent, which the landlord had refused, was not a waiver; nor was an application to the landlord to be repaid for an amount expended in repairs, to which the landlord had assented, and had repaid the sum, a waiver, although the plaintiff on obtaining his lease would be bound to refund the money to the landlord. The American cases are equally strong, and perhaps even stronger. *Waters v. Travis*, 9 Johns. 450, a contract by which vendor was to convey at a time named, and vendee was to secure the price "at the same time." Vendee took possession—no conveyance was made, and the price was not paid for fifteen years. This delay was held not to prevent the vendee from obtaining a specific performance. In *Williams v. Lewis*, 5 Leigh, 686, a delay from 1774 to 1822 did not bar the vendee's right to enforce a conveyance, he having been in possession during the whole period; also, *Miller v. Bear*, 3 Paige, 466; *Longworth v. Taylor*, 1 McLean, 395.

(1) *Morse v. Merest*, 6 Mad. 26; *Shrewsbury, etc., Ry. Co. v. London & N. W. Ry. Co.*, 2 McN. & G. 324, 355; *Ridgway v. Wharton*, 6 H. L. Cas. 292, per Lord St. LEONARDS; *Mix v. Beach*, 46 Ill. 311. In contracts where time is not essential, so long as both parties have taken no steps to assert their respective rights or demand a completion, so long as the vendor has made no tender or offer of a deed or demand upon the vendee, and the vendee has made no tender or offer of the price or demand upon the vendor, the contract continues to subsist until, of course, it should be barred by the statute of limitations. Either party may at any time make a proper tender or offer of performance and demand of fulfillment upon the other; neither can complain of the other doing nothing so long as he himself has done nothing, (*Leaird v. Smith*, 44 N. Y. 618; *Van Campen v. Knight*, 63 Barb. 205; *Crabtree v. Levings*, 53 Ill. 526); and, also, where the contract is wholly silent in respect of time. *Mather v. Scoles*, 35 Ind. 1.

length has elapsed between the conclusion of the contract and the taking of any steps for its enforcement, does not necessarily constitute the laches which will preclude the obtaining of relief; other facts may intervene, other circumstances may arise, which explain the delay, or obviate its prejudicial effects. Thus, the remedial right may be preserved through any length of time by acts or declarations of the party holding the right which sufficiently show that he claims it to be still existing, and that he intends to avail himself of it, or by acts or declarations of the other party which sufficiently show that he admits the right to be in continual existence.(1) But a continual claim by mere words, without any acts in conformity with and support of it, will not keep alive a right which would otherwise be lost by the lapse of time.(2)

SEC. 407. Where a vendee delays in completing the contract in order that he may speculate upon the chances of its proving to be an advantageous bargain, or that through a rise in value or other change of circumstances his gain may be assured, and then when he is thus certain that it will be a fortunate speculation offers to perform and sues to compel a conveyance by the vendor, a court of equity will refuse to grant him the remedy, even although he may have at an earlier day paid part of the purchase-price.(3) And a rise in the value of the land during the interval will always be a fact of much weight in tending to show that the vendee's delay was speculative, and for the very purpose of awaiting such a turn favorable to himself.(4)

(1) *Snowman v. Harford*, 55 Me. 197; *Schroeppel v. Hopper*, 40 Barb. 425; *Williston v. Williston*, 41 Barb. 635; *Pritchard v. Todd*, 38 Conn. 413; *Hoyt v. Tuxbury*, 70 Ill. 331; *Brink v. Steadman*, 70 Ill. 241; *Spalding v. Alexander*, 6 Bush. 100; *Peters v. Delaplaine*, 49 N. Y. 362; *Hubbell v. Van Schoening*, 49 N. Y. 326.

(2) *Clegg v. Edmundson*, 26 L. J. Ch. 673; *Lehman v. McArthur*, L. R. 3 Eq. 746.

(3) *Harrington v. Wheeler*, 4 Ves. 686; *Alley v. Deschamps*, 13 Ves. 225; *South Eastern Ry. Co. v. Knott*, 10 Hare, 122; *Firth v. Greenwood*, 1 Jur. (N. S.) 866; *Alloway v. Braine*, 26 Beav. 575. In *Alley v. Deschamps*, *supra*, Ld. Ch. ERSKINE said: "It would be dangerous to permit parties to lie by, with a view to see whether the contract will prove a gaining or a losing bargain, and according to the event either to abandon it, or, considering time as nothing, to claim a specific performance, which is always the subject of discretion." *Merritt v. Brown*, 4 C. E. Green, 236; *Kirby v. Harrison*, 2 Ohio St. 326, 333; *Norris v. Knox*, 1 Pittsb. 56; *O'Fallon v. Kennerly*, 45 Mo. 124; *Roby v. Cossitt*, 78 Ill. 638; *Johns v. Norris*, 7 C. E. Green, 102; *Peters v. Delaplaine*, 49 N. Y. 362; *Hubbell v. Van Schoening*, 49 N. Y. 326.

(4) *Hepburn v. Auld*, 5 Cranch, 262; *Brashier v. Gratz*, 6 Wheat. 528, 539; *Cooper v. Brown*, 2 McLean, 495; *McKay v. Carrington*, 1 McLean, 50; *Rogers*



Sec. 408. The rule may be laid down as general, applying to either the vendor or the vendee, that where there has been a change of circumstances or relations which render the execution of the contract a hardship to the defendant, and this change grows out of or is accompanied by an unexcused delay on the part of the plaintiff, the change and the delay together will constitute a sufficient ground for denying a specific performance when sought by the one who was thus in default.(1) But, as has been already stated, neither a rise in value, nor a depreciation, nor a loss or injury to the property, will, in the absence of unreasonable delay by the plaintiff, avail to the defendant as a bar to the relief sought by the plaintiff.(2) If the vendee has

*v. Saunders*, 16 Me. 92; *Richmond v. Gray*, 3 Allen, 25; *Goldsmith v. Guild*, 10 Allen, 239; *Ely v. McKay*, 12 Allen, 323; *Patterson v. Martz*, 8 Watts, 373, 374; *Bellas v. Hays*, 5 S. & R. 427; *Dubois v. Baum*, 10 Wright, 537; *Kirby v. Harrison*, 2 Ohio St. 326, 333; *Pillow v. Pillow*, 3 Humph. 644; *Colcock v. Butler*, 1 Dessaus. 307; *Norris v. Knox*, 1 Pittsb. 56. It should be remembered, however, that as the vendee becomes the equitable owner of the premises, he is entitled to any rise in their value and must bear any loss which may happen—so that any change in either of these directions would not ordinarily bar a suit by or against him. The rule laid down in the text assumes the *intent* of the delay to be a waiting for, on account of, an expected rise. See *Low v. Treadwell*, 12 Me. 447; *Falls v. Carpenter*, 1 Dev. & Bat. Eq. 237, and cases cited *ante* in the first subdivision of this section.

(1) This rule includes the case of a loss or accident to the property, and of its increase in value, where either is the result of or occasioned by the plaintiff's delay; the defendant may set up the fact and the delay as a defense. *Miller v. Henlan*, 1 P. F. Smith, (51 Pa. St.) 265; *Porter v. Dougherty*, 1 Casey, 405; *Pigg v. Corder*, 12 Leigh, 69; *Booten v. Scheffer*, 21 Gratt. 474, 495; *Garnet v. Macon*, 2 Brock. 185; 6 Call. 308; *B'k of Alexandria v. Lynn*, 1 Pet. 376; *Christian v. Cabell*, 22 Gratt. 82; *Griffin v. Cunningham*, 19 Gratt. 571; *Kirby v. Harrison*, 2 Ohio St. 326; *Merritt v. Brown*, 4 C. E. Green, 286; *Westerman v. Means*, 2 Jones, 97; *Norris v. Knox*, 1 Pittsb. 56; *O'Fallon v. Kennerly*, 45 Mo. 124; *Roby v. Cossitt*, 78 Ill. 638; *Johns v. Norris*, 7 C. E. Green, 102; *Boston, etc., R. R. v. Bartlett*, 10 Gray, 384; *Fuller v. Hovey*, 2 Allen, 324; *Williams v. Hart*, 116 Mass. 513; *Hubbell v. Van Schoening*, 58 Barb. 498; 49 N. Y. 323; *Peters v. Delaplaine*, 49 N. Y. 362; *Tibbs v. Morris*, 44 Barb. 138; *Van Zandt v. New York*, 8 Bosw. 375; *Haughwout v. Murphey*, 6 C. E. Green, 118; *Lawrence v. Lawrence*, 6 ib. 317; *Eyre v. Eyre*, 4 ib. 102; *Gariss v. Gariss*, 1 ib. 79; *Van Doren v. Robinson*, 1 ib. 256; *Du Bois v. Baum*, 46 Pa. St. 537; *Andrews v. Bell*, 56 Pa. St. 343; *Cadwallader's Appeal*, 57 Pa. St. 158; *Nelson v. Hagerstown B'k*, 27 Md. 51; *Campbell v. Hicks*, 19 Ohio St. 433; *Thompson v. Bruen*, 46 Ill. 125; *Iglehart v. Gibson*, 56 Ill. 81; *Mason v. Owens*, 56 Ill. 259; *Rose v. Swann*, 56 Ill. 37; *Shortall v. Mitchell*, 57 Ill. 161; *Phelps v. Ill. Cent. R. R.* 63 Ill. 468; *Toby v. Foreman*, 79 Ill. 489; *Walker v. Douglass*, 70 Ill. 445; *Smith v. Lawrence*, 15 Mich. 499; *McClintock v. Laing*, 22 Mich. 212; *Johnson v. Hopkins*, 19 Iowa, 49; *Addington v. McDonnell*, 63 N. C. 389; *Gentry v. Rogers*, 40 Ala. 442; *Eppinger v. McGreal*, 31 Tex. 147; *Glasscock v. Nelson*, 26 Tex. 150; *Conway v. Kinsworthy*, 21 Ark. 9.

(2) *Andrews v. Bell*, 6 P. F. Smith, 343; *Brewer v. Herbert*, 30 Md. 301; *Hale v. Wilkenson*, 21 Gratt. 75; *Ambrose v. Keller*, 22 Gratt. 769; *Booten v. Scheffer*,

suffered a considerable time to elapse without any steps to enforce, so that it may fairly be inferred that he has abandoned his rights, and in the meantime the title has passed from the vendor to devisees or purchasers, the vendee will not be permitted to interfere with and defeat the rights of these third persons by obtaining a decree for the enforcement of the agreement against them, or against the land which has come into their ownership.(1)

SEC. 409. When one party sets up an untenable objection to a completion of the contract, and thereby causes a delay, he cannot rely upon such delay in defense to a specific performance asked by the other.(2) And, as a general rule, the court will refuse to aid a vendee who has set up trifling or vexatious objections to the title, and thereby hindered its execution by the vendor, and shown a manifest intention not to perform on his own part; and this is emphatically so, if the value of the property has increased during the interval of delay.(3) A court of equity will not aid a vendee who has delayed in making the payments required by the contract, if his delay was caused by his actual pecuniary inability—that is, if when he made the agreement he was unable to pay, and had no reasonable ground for supposing that he would be able to comply with the terms of the contract at the stipulated time. A purchaser who thus enters into an agreement, knowing his inability to fulfill, is not dealing honestly or justly with the vendor, and equity will not relieve him from a default which was thus inevitable, and which placed the vendor in a position of dis-

21 Gratt. 474, 494; *Cooper v. Pena*, 21 Cal. 403. And see *ante* in the first subdivision of the present section.

(1) *Van Doren v. Robinson*, 1 C. E. Green, 256; *Gariss v. Gariss*, 1 C. E. Green, 79; *Callen v. Ferguson*, 5 Casey, 247; *Porter v. Dougherty*, 1 Casey, 405; *Miller v. Henlan*, 1 P. F. Smith, 265; *Anthony v. Leftwich*, 3 Rand. 268; *Smith v. Lawrence*, 15 Mich. 499; *Hough v. Coughlan*, 41 Ill. 130; *Norris v. Knox*, 1 Pittsb. 56.

(2) *Monro v. Taylor*, 3 McN. & G. 713, 723. It was held in *Shortall v. Mitchell*, 57 Ill. 161, that if a vendee fails to make a payment at a time stipulated in the contract, merely on the ground of an apparent adverse lien or incumbrance upon the premises, he is thereby precluded from maintaining a suit against the vendor for a specific performance, however important a circumstance such lien might be as affecting a suit brought by the vendor to enforce the contract. This decision will illustrate the tendency of the American cases, especially the more modern ones, to give force to stipulations concerning the time of payment, according to their literal import. The recent case of *Hoyt v. Tuxbury*, 70 Ill. 331, is also an illustration of the text, and of the tendency of the American courts to treat delay as a defense.

(3) *Hayes v. Caryll*, 1 Bro. P. C. 126 (Toml. ed.); *Spurrier v. Hancock*, 4 Ves. 667; *Pope v. Simpson*, 5 Ves. 145; *Main v. Melbourn*, 4 Ves. 720; *Burke v. Smyth*, 3 Jon. & Lat. 193.

advantage from the very beginning.(1) And if the vendor fails to perform on his part, at the stipulated time, and the contract is inequitable, or the price exorbitant—or, on the other hand, if the vendee fails in like manner, and the price is inadequate—in either case the party so delaying cannot enforce a specific performance upon the other.(2)

SEC. 410. In addition to the cases of loss or accident, or change in value resulting from or accompanying delay, other subsequent events affecting the position and relations of the parties, and rendering it hard and inequitable towards the defendant to enforce the agreement upon him, when occurring by means of the plaintiff's delay—that is, when the delay has furnished the opportunity for their occurrence—may enable the defendant to defeat the plaintiff's suit for a specific performance.(3) In accordance with this doctrine, and as an illustration of its application, if a contract of purchase is entered into by the vendee for the purpose of accomplishing some special object, or of carrying into effect some particular undertaking in which he is interested, and of which the vendor is informed, and which object or undertaking might, in all reasonable probability, have been accomplished if the vendor had fulfilled the terms of his agreement at or near to the time stipulated for a completion; but, on the contrary, the vendor delays so long in performing, or offering to perform his part, that the purchaser's design is entirely defeated, and the object which he had in view cannot be attained, a specific performance at the vendor's suit would be refused. The same would be true if the position of the parties were reversed; and the vendor had a special purpose, which the delay of the vendee—who afterwards sued for a specific enforcement—has prevented from being accomplished.(4)

(1) *Gee v. Pearce*, 2 DeG. & Sm. 325; *Aberaman Iron Works v. Wickens*, L. R. 5 Eq. 485, 507, 508.

(2) *Whorwood v. Simpson*, 2 Vern. 186; *Lewis v. Lord Lechmere*, 10 Mo.l. 503.

(3) *Peters v. Delaplaine*, 49 N. Y. 362; *Hubbell v. Van Schoening*, 49 N. Y. 326; *Jackson v. Ligon*, 3 Leigh, 161.

(4) *Pratt v. Carroll*, 8 Cranch, 471. The vendor agreed to convey certain land lying in or near the city of Washington, and his object, as shown by other terms of the contract, was to draw the spreading city in the direction of the land in question, and thus to improve the value of his other adjacent property; and with this intent, he required the vendee to covenant, and the vendee did covenant, to erect certain buildings on the land within a specified time. Vendee failed to build as he agreed. The vendee suing after a considerable time, the court held that the plaintiff's failure to build was excused by defendant's failure to convey; but still, as during the lapse of time the city had largely and permanently extended in another direction, the object of the contract was wholly defeated, and therefore the plaintiff's suit was *dismissed*.

SEC. 411. As already stated, time is always material, even if not essential, in a unilateral contract—*e. g.*, an agreement to give an option to purchase, or to renew a lease, and the like—and a delay by the one to whom the offer is made, although not great, will be closely examined by the court, and if not fully explained and excused, will prevent such party from enforcing the stipulation.(1) And, for the same reason, the delay of the vendee in deciding whether he will accept or reject the title offered him by the vendor, operates unfairly and unequally, and must be justified, because the vendee can enforce whether the title is good or bad, while the vendor can only enforce when the title is good, and the two parties do not, therefore, stand upon the same footing.(2)

SEC. 412. Where one party, even without any just or sufficient reason for so doing, and as a mere act of arbitrary will, notifies the other that he shall not perform the contract—shall treat it as at an end—acquiescence by the party notified will cut off the latter's right of enforcement, and this acquiescence will be sufficiently shown by a delay in commencing a suit which would otherwise be too short to prejudice his rights.(3) In applying this rule two year's delay after the notice,(4) and one year's delay,(5) have been held by English courts sufficient to prevent a decree. This rule, however, is not enforced when, from the circumstances, it would operate unjustly.(6)

(1) *Moote v. Scriven*, 33 Mich. 500; *Brooke v. Garrod*, 27 L. J. Ch. 226.

(2) *Spurrer v. Hancock*, 4 Ves. 667; *Lloyd v. Collett*, 4 Bro. C. C. 469; *Harrington v. Wheeler*, 4 Ves. 686; *Guest v. Homfray*, 5 Ves. 818; *Walker v. Jeffreys*, 1 Hare, 352; *Southcomb v. Bp. of Exeter*, 6 Hare, 213; *Dorin v. Harvey*, 15 Sim. 49.

(3) *Colby v. Gadsden*, 34 Beav. 418, per Lord ROMILLY, M. R. : "In these cases . . . where one person says, 'I will have nothing more to do with the contract—I put an end to it'—if the other party to the contract, who insists on its being carried into execution, does not file his bill speedily—a time which is not very accurately fixed, though the cases have determined that it must not exceed a year—he shall not be allowed to insist that the contract shall be carried into execution." This rule was affirmed and applied in the case of *McDermid v. McGregor*, 21 Minn. 111; but the limitation was very properly stated that the vendee to whom the notice was given, and whose delay should amount to an acquiescence therein, must not be in possession of the land. It is plain, on principle, that if a vendee in possession was thus notified, his mere delay in bringing suit should not have much effect as an acquiescence if he still retained possession of the premises; his affirmative act of retaining possession would defeat any inference to be derived from his negative omission to bring a suit, if the latter, at least, was not continued for an unreasonable time.

(4) *Heaphy v. Hill*, 2 S. & S. 29.

(5) *Watson v. Reid*, 1 Russ. & My. 236; *Parkin v. Thorold*, 16 Beav. 73,

(6) *Walker v. Jeffreys*, 1 Hare, 353; *Jones v. Jones*, 12 Ves. 188.

SEC. 413. In England, on account of the highly complicated nature of titles, the artificial modes of conveyancing, and the absence of any general system of registration, certain steps or proceedings in the course of completing a contract, have become so firmly established in practice that they are constantly recognized by the judicial decisions as almost having the effect of legal rules. Among these, one of the most, and perhaps the most important step in the whole process of completing the contract, is the furnishing an abstract of his title by the vendor to the vendee, in order that the latter may have an opportunity of inspecting it and deciding whether he will accept it. In this country such an abstract would be compiled from the registrar's office, and is sometimes, though inaccurately, denominated a "search." In England it is compiled from the title-deeds in the vendor's possession, or within his reach; and it is sometimes stipulated that the abstract is to commence with some specified person as owner, or with some specified conveyance as the source of title, and that the vendee is not to demand anything or make any examination prior, in point of time, to this assumed source. It is plain that this must be the first essential step after the contract, for until the vendee is furnished with an abstract, he has, and can have, no means of ascertaining the truth concerning the title, and no basis of judging whether he can, with safety, accept it and pay the purchase-price. We naturally, therefore, find that the English decisions have laid down numerous special rules concerning the abstract, the time when it should be furnished, the time and form of objections based upon it, waiver, and the like. In this country such an abstract is not, by any means, universally required or given as a proceeding in the completion of the contract; and from the simplicity of our titles, and the short period of time through which they are deduced, it is often quite unnecessary; indeed, it can hardly ever be considered as essential, since, as the practice of registering is general, the vendee, as well as the vendor, has an equally easy and open means of investigating the title, and ascertaining whether it is perfect or defective. Still, the furnishing an abstract of the title by the vendor is by no means unknown, or even unusual in the United States, and it is sometimes required by a provision of the contract itself. Many of the special rules concerning the abstract, which have been established by the English decisions, cannot be said to prevail in their exact and literal form in this country, because the circumstances to which they apply do not exist; but at the same time the underlying doctrine and principle of these rules must, undoubtedly, control, under conditions of facts and circumstances,

in the execution of our contracts, which are analogous to the furnishing the abstract in England, viz., in the proceedings for perfecting the vendor's title, and the negotiations between the parties through which the title is finally accepted, and in the execution and delivery of the deed of conveyance. The rules concerning the abstract are, therefore, given—as settled by the cases—under the assumption that they may be useful to the American lawyer.

SEC. 414. At law the vendor must have his abstract and title-deeds at the day specified, or he loses all rights to enforce the contract, and is liable to an action by the vendee for a recovery of the deposit.(1) But in equity the purchaser must act, if he wishes to hold the vendor to a strict compliance in respect to the time. The duty is not solely that of the vendor to tender the abstract, the purchaser must demand it on the day specified, if any day is appointed by the agreement, or if no day was appointed, then he must demand it on a day which will leave a sufficient period for the completion of the contract before the time named in the agreement; and if he neglects to make such demand, he thereby waives a compliance by the vendor in respect to time, and cannot object at a delay in delivering the abstract.(2) When a day is named in the agreement for a delivery of the abstract, but the vendor fails to comply, and delivers it at some subsequent time, yet if the vendee then receives it without objection, he thereby waives the delay, even though time had been made essential in respect of such delivery.(3)

SEC. 415. Where the contract stipulated that the abstract should be delivered on or before a specified day, and also that any objections to the title must be presented within a certain other period, and added, that time with respect to the latter provision should be of the essence

(1) *Berry v. Young*, 2 Esp. 640, n.

(2) *Guest v. Homfray*, 5 Ves. 818, 823 (case of demand on the day appointed); *Jones v. Price*, 3 Anstr. 924 (case of a demand where no day was appointed).

(3) *Smith v. Burnam*, 2 Anstr. 527; *Pinckney v. Curteis*, 4 Bro. C. C. 329; *Paine v. Meller*, 6 Ves. 349; in the leading case of *Seton v. Slade*, 7 Ves. 265, there was a notice by vendee that if title was not made out and possession given by the day named in the contract for the payment and conveyance and final completion, he should claim the contract to be rescinded, and should insist upon a return of his deposit; in the face of this notice, the vendor delayed in delivering his abstract until a very few days before the day appointed, as above stated. for the final completion, there not being a sufficient interval left for the vendee to examine and decide upon the title (it was said on the argument that there was not even time to read through the abstract); yet, as the vendee received the abstract without making any objections, it was held that he had waived time, and could not insist upon the delay as a defense, and a specific performance was decreed against him.

of the contract, a failure of the vendor to deliver his abstract within the time appointed for that purpose, relieves the purchaser from the necessity of making his objections within the prescribed period and excuses his delay, notwithstanding the stipulation as to time being essential. How long a delay would be permitted in such a case—or, in other words, the time within which objections will be considered as waived—will depend upon the general principles of the court and the acts of the parties.(1)

SEC. 416. It is also a settled rule in England, that where the vendor has done nothing whatever towards completing the contract, and immediately upon the arrival and elapsing of the day stipulated for the completion, the vendee has given notice that he shall treat the matter as at an end, and shall not perform on his own part, and has demanded a return of his deposit, a court of equity will not sustain a suit subsequently brought by the vendor for a specific enforcement, nor interfere by injunction on his behalf to restrain an action to recover back the deposit money brought by the vendee.(2) But if the vendor has actually taken steps, and in good faith attempted to make out his title, and is not chargeable with such an unreasonable or unnecessary delay as would constitute *laches* or *negligence*, such a notice by the vendee, and demand of his deposit, will not have the effect of cutting off the vendor's remedial rights.(3)

SEC. 417. The delay in completing which arises in consequence of and during a pending *bona fide* negotiation between the parties con-

(1) *Upperton v. Nickolson*, L. R. 6 Ch. 436; reversing S. C., L. R. 10 Eq. 228.

(2) *Lloyd v. Collett*, 4 Bro. C. C. 469; 4 Ves. 689; *Omerod v. Hardman*, 5 Ves. 737; *Warde v. Jeffery*, 4 Price, 294.

(3) *Fordyce v. Ford*, 4 Bro. C. C. 495; *Radcliffe v. Warrington*, 12 Ves. 326. As illustrations, it was held in *Dyer v. Hardgrave*, 10 Ves. 505, that although the vendee had given the notice described in the text, and although after the day stipulated for completing the contract, some time elapsed before the vendor had finished the necessary repairs upon the house, which had been described as being in good repair, yet the vendee should be compelled to accept the house and perform, unless he showed that he wanted the house for his own residence before the time when the repairs were completed; and in *Hall v. Smith*, 14 Ves. 426, when the same notice was given, and there was a considerable time (several months) after the day fixed for completion before a former lease of the house in question ran out so that possession could be given to the vendee, although the contract stipulated that possession should be given at the day specified—several months earlier—yet it was held, that the vendee had no defense, unless he wanted the house for his own residence *before* the lease of it ran out, and, therefore, before the possession was actually given him. The reason of the limitation in these two cases is, that in contracts for the sale or leasing of houses for the vendee's own residence, time is *essential*, and not simply material.

cerning questions material to their rights, will not constitute *laches*, and will not, therefore, prevent a decree of specific performance in favor of either, even though the negotiation carried on was to be without prejudice to a notice given by the other party that he should treat the contract as at an end. The fact of going on with such a negotiation seems to be *ipso facto* a waiver of such a notice, and no protest or declaration that it is to be without prejudice, can avail to keep the notice alive and effectual.(1) If, however, the matter in dispute is not the one which actually causes the delay, the pendency of a negotiation concerning it will not affect the question of delay, and whether it amounts to fatal *laches* or not, must be decided upon other considerations independently of the negotiations.(2.)

SEC. 418. Several particular instances of waiver have already been given, but the doctrine may be stated in the most general terms, that, whether time is originally essential or is made so by notice, or is simply material, all objections to a delay, either in finally completing or in doing any particular act, or to a failure to comply with the stipulations concerning time, will be waived by conduct on the part of the one who could otherwise raise them, which shows with reasonable certainty that he could not consistently have intended to insist upon the objection, or that he did intend to treat the contract as still subsisting, notwithstanding the delay.(3) And, of course, a waiver

(1) *Southcomb v. B'p of Exeter*, 6 Hare, 213.

(2) *Gee v. Pearse*, 2 DeG. & S. 325. In this case the vendee's (who was plaintiff) pecuniary inability to pay at the time caused the delay, and the specific performance which he sought was therefore refused, although there was a dispute and a negotiation touching the title and a valuation of the property. It is also held in England, that the vendee's permitting the deposit money to be retained by the vendor during the interval between a notice given by the vendee, that he should treat the contract as ended, and the filing the bill for a specific performance will not affect the question whether a delay is *laches*. *Watson v. Reid*, 1 Russ. & My. 236; *Southcomb v. B'p of Exeter*, 6 Hare, 213. Nor would the vendee's continuing in possession of the premises, when it is done by virtue of a special arrangement therefor, affect the question of *laches*. *Southcomb v. B'p of Exeter*, 6 Hare, 213.

(3) *King v. Wilson*, 6 Beav. 124; *Rector v. Price*, 1 Mo. 373. *Brassell v. McLemore*, 50 Ala. 476; *Grigg v. Landis*, 6 C. E. Green, 494. The doctrine is general that a party who seeks to rescind, avoid, or abandon a contract on the ground of fraud, mistake, defect of title, and the like, must do so with promptness and diligence as soon as the facts constituting the objection are discovered by him; if a vendee retains possession and enjoyment of the premises after notice of the facts giving him the right to rescind or abandon, he certainly thereby waives the objection and his right to avail himself of it. See *Garrett v. Lynch*, 45 Ala. 204; *Foley v. Crow*, 37 Md. 51; *Campbell v. Medbury*, 5 Biss. 33; *Sawyer v. Sledge*, 55 Geo. 152. When a vendor in an action for a specific performance relies upon the vendee's waiver of an objection to the title, he must aver the



may always be made in express terms. With respect to delay in completing by the vendor. If the title is not yet perfect, and the day for completion passes, but the vendee continues the negotiation or dealing concerning it, he thereby waives the delay ;(1) and the acceptance of the abstract, without objection after the time, amounts to a waiver, even though the delivery at such a time has been made essential.(2) Although the party has previously given a notice that he will treat the contract as ended, this will not prevent such conduct on his part from amounting to a waiver both of the objection to delay and of the notice.(3) It has also been held that a party waived the right to claim that time was essential in completing the contract, and to object to a delay therein, by demanding that the other party should go on and complete after the time stipulated therefor had expired;(4) and by a written extension of the time contained in a letter.(5)

SEC. 419. With respect to delays by the purchaser. Objections to a failure by the vendee to make the payments at the time required, are also waived by the vendor's conduct which recognizes the contract and the duty to pay as still subsisting.(6) And when the vendee is origi-

waiver in his pleading by suitable allegations, so that the fact may be put in issue, or otherwise no evidence of the waiver will be admissible. Page v. Greeley, 75 Ill. 400.

(1) Pincke v. Curteis, 4 Bro. C. C. 329.

(2) Seton v. Slade, 7 Ves. 265; Smith v. Burnam, 2 Anstr. 527; Pincke v. Curteis, 4 Bro. C. C. 329; Paine v. Meller, 6 Ves. 349.

(3) Hipwell v. Knight, 1 Y. & C. Ex. 401; Southcomb v. B'p of Exeter, 6 Hare, 213.

(4) Pegg v. Wisden, 16 Beav. 239.

(5) Parkin v. Thorold, 16 Beav. 59, 69; Wood v. Bernal, 19 Ves. 220. It has been said, however, that when a vendee protests against a delay, and goes on negotiating or dealing about the title under the protest, he does not thereby waive his right to object. Magennis v. Fallon, 2 Moll. 561, 576. But this cannot be reconciled with the rule laid down in the preceding paragraph (§ 417), nor with the cases there cited; and is contrary to the principle which underlies all these rules. Its correctness is, therefore, more than doubtful. See, to the same effect, Sug. on Vendors, p. 291.

(6) In Hudson v. Bartram, 3 Mad. 440, the contract was for the assignment of a lease by the lessee; he had claimed that the assignment was forfeited by the assignee's failure to pay a part of the price at the stipulated time; but he afterwards got the assignee to pay the rent to the superior landlord, and by this act he was held to have waived the right to claim any forfeiture, because it was wholly inconsistent with his claim that the contract had been ended; and in *Ex parte* Gardner 4 Y. & C. Ex. 503, it was stipulated by the parties, that if the balance of the purchase-price was not paid at a day named, the contract of sale should be ended—void; the vendee did not pay, but the vendor, nevertheless, allowed him to remain in possession of the premises, and took from him a warrant of attorney to confess judgment in ejectment, and by these acts the vendor was

nally bound to present his objections to the title within a certain time, the objection to his failure in this respect will be waived by the vendor's subsequent conduct; for example, by a subsequent correspondence concerning the title;(1) by a subsequent renewal of the negotiation concerning the price;(2) and by the vendor's own failure to deliver the abstract at the time appointed.(3) A waiver of the condition or stipulation that an act is to be done at or within some specified time, is not a waiver of the act itself—that is, of the duty growing out of the contract to perform the act; mere waiver of the particular time leaves the party bound to do the act at *some* time, and generally within a *reasonable* time depending upon all the circumstances of the case.(4)

SEC. 420. It is possible, and even probable, that some of these special rules, growing out of the peculiar methods of conveyancing and forms of contract customary in England, and from the condition of the English law concerning titles and estates, will not be exactly followed by the American courts, since the same circumstances can hardly ever arise in this country. Still, the general doctrines concerning time, delay, laches, and waiver, are as firmly established by the American decisions as by those of the English and Irish courts, and the principles contained in the foregoing special rules would be found applicable to analogous facts and circumstances which may exist in connection with our simple forms of proceeding and titles to real estate.(5)

held to have waived the forfeiture resulting from the vendee's breach of the stipulation. *Brasell v. McLemore*, 50 Ala. 476, acceptance by vendor of a payment made after the day prescribed; *Grigg v. Landis*, 6 C. E. Green, 494, acceptance by the vendor of the balance of the price after a condition broken.

(1) *Cutts v. Thodey*, 13 Sim. 203.

(2) *Eads v. Williams*, 4 DeG. M. & G. 674.

(3) *Upperton v. Nickolson*, L. R. 6 Ch. 436.

(4) See *Counter v. Macpherson*, 5 Moo. P. C. C. 83.

(5) Although the American courts are inclined to regard time as essential, and to require promptness in performance to a much greater extent than is done in England, still, if the plaintiff has not been guilty of such negligent delay as amounts to laches, and compensation is possible; or, as has already been stated, if both parties have been in default with respect to the time of performance, the contract will be specifically enforced. *Snowman v. Harford*, 55 Me. 197; *Pritchard v. Todd*, 38 Conn. 413; *Delevan v. Duncan*, 49 N. Y. 485; *Williston v. Williston*, 41 Barb. 635; *Ashmore v. Evans*, 3 Stockt. 151; *De Camp v. Crane*, 4 C. E. Green, 166; *Spalding v. Alexander*, 6 Bush. 160; *Richmond v. Robinson*, 12 Mich. 193; *Morris v. Hoyt*, 11 Mich. 9; *Mix v. Beach*, 46 Ill. 311; *Laverty v. Hall's Admr.*, 19 Iowa, 526; *Farris v. Bennett*, 26 Tex. 568. It is impossible to reconcile all the American decisions involving the question as to time, or the principles upon which they are based. In some of the states the equity doctrine with respect to time

SEC. 421. 2. *When the delay is caused by a defect in the vendor's title, or by a difficulty in perfecting the title.*—If the delay arises from a defect in his title, which the vendor finally cures, or from a difficulty in making the title good—such as the vendee has a right to demand—for example, in obtaining proper evidence, clearing off incumbrances, getting in outstanding estates, and the like; and time is not an essential element of the contract, either from express stipulation, or from the nature of the subject-matter or object of the agreement—then the delay thus occasioned, or the lapse of time while the vendor is engaged in making his title good, will not prevent him from obtaining a decree of specific performance against the purchaser. The doctrines of the equity courts are satisfied if the vendor is able to procure and give a good title at the time of the decree, even though he could not do so at the time of commencing his suit.<sup>(1)</sup> But a court

seems to be virtually abandoned, or, at least, disregarded, and the same exact compliance with the provisions of the contract is demanded from the plaintiff in a suit for specific performance, which is requisite to maintain an action at law for a breach of the agreement. In other states the equity doctrine is admitted and followed, but with limitations and restrictions unknown to the English tribunals.

(1) *Langford v. Pitt*, 2 P. Wms. 630; *Jenkins v. Hiles*, 6 Ves. 646; *Wynn v. Morgan*, 7 Ves. 202; *Eyston v. Simonds*, 1 Y. & C. C. C. 608; *Salisbury v. Hatcher*, 2 Y. & C. C. C. 54; *Sidebotham v. Barrington*, 3 Beav. 524; 4 Beav. 110; 5 Beav. 261; *Chamberlain v. Lee*, 10 Sim. 444; *Phillipson v. Gibbon*, L. R. 6 Ch. 428. In the leading case, *Langford v. Pitt*, *supra*, the vendee urged in defense that the plaintiff, on his own showing, had no title when he made the contract to sell. Sir JOSEPH Jekyll, M. R., thus stated the doctrine: "It is sufficient, if the party entering into articles to sell, has a good title at the time of the decree, the direction of the court (*i. e.*, to the Master) being in all these cases to inquire whether the seller *can*, not whether he *could* make a title at the time of executing the agreement." The same doctrine is fully established by the American courts: *Jones v. Robbins*, 29 Me. 351; *Dressel v. Jordan*, 104 Mass. 407; *Old Colony R. R. v. Evans*, 6 Gray, 25; *Richmond v. Gray*, 3 Allen, 25; *Beebe v. Dowd*, 22 Barb. 255; *Dutch Church v. West*, 7 Paige, 77; *Brown v. Haff*, 5 Paige, 235; *Winne v. Reynolds*, 6 Paige, 407; *Allerton v. Johnson*, 3 Sandf. Ch. 73; *Seymour v. Delancey*, 3 Cow. 445; *Ley v. Huber*, 3 Watts, 367; *Tiernan v. Roland*, 3 Harris, 429, 436; *Wilson v. Tappan*, 6 Hammond, 172; *Cotton v. Ward*, 3 Monr. 313; *Lockett v. Williamson*, 37 Mo. 383; *Hepburn v. Dunlop*, 1 Wheat. 179; *Sharp v. Trimmer*, 9 C. E. Green, 422; *Christian v. Cabell*, 22 Gratt. 82. The doctrine of the text is, however, by some of the American decisions, limited in the following manner: Where the vendor did not, at the time, own what he agreed to sell, and had no reasonable expectation or probability of becoming owner—no interest which might develop into a complete ownership—and the contract was absolute in its form, and did not in its terms show that the vendor was to buy or otherwise acquire the premises, and then convey them to the purchaser, a court of equity, it is said, will not sustain his suit for a specific performance, since the contract is unequal in its very inception. *Hurley v. Brown*, 98 Mass. 545, 547; *Tiernan v. Roland*, 3 Harris, 429, 436; *Ley v. Huber*, 3 Watts, 367; *Pipkin v. James*, 1

of equity will not extend this favor to a vendor who has not done all that was in his power to make out a good title within a reasonable time;(1) nor to one who has fraudulently concealed from the purchaser the defect in his title which causes the delay.(2)

SEC. 422. According to the ordinary practice of the court the title ought, as a general rule, to be perfected at the time of the master's report, made in pursuance of the inquiry directed as to the title.(3) This, however, is rather a rule of practice than of doctrine, and is not absolutely essential; for the vendee, defendant, will not, in all cases, be allowed to defeat the decree and thus avoid a specific performance, because the title cannot be completely made out at the time of the report; but it must clearly appear that it will be certainly and speedily perfected.(4) Where there is an outstanding title in some other person which might have prevented the vendor from perfecting his own title, and might have been a valid objection to a decree in his favor, and the purchaser buys up or otherwise acquires this outstanding interest, he cannot rely upon the defect in the vendor's title as a sufficient ground for preventing the vendor's relief, since he has in his own hands the means of making it good.(5) Where the vendor sues

Humph: £25, 328. This exception does not apply to a case where the contract itself shows, or the vendee knows, that the vendor is not owner, but intends to acquire the ownership, and then convey the land in pursuance of the agreement; for such a contract will be enforced against the vendee. *Dresell v. Jordan*, 104 Mass. 407; *Old Colony R. R. v. Evans*, 6 Gray, 25. Nor does the exception apply when the vendee knows the title to be defective, or where he simply contracts to purchase whatever interest the vendor owns, and thus assumes the risk of the title being defective. *Brashier v. Gratz*, 6 Wheat. 528. And one who only holds the equitable estate under a contract for the land, may become a vendor and may enforce his agreement to convey, although he cannot complete without getting in the outstanding legal titles. *Tiernan v. Roland*, 3 Harris, 429; *Ley v. Huber*, 3 Watts. 367.

(1) *King v. Hamilton*, 4 Pet. 311; *Tiernan v. Roland*, 3 Harris, 429; *Rider v. Gray*, 10 Md. 282, 283; *Grundy v. Ford's Ex'ors*, *Littell's Sel. Cas.* 129.

(2) *Christian v. Cabell*, 22 Gratt. 83.

(3) *Cowgill v. Lord Oxmantown*, 3 Y. & C. Ex. 377; *Kirwan v. Blake*, cited in 2 Moll. 581, 582.

(4) *Coffin v. Cooper*, 14 Ves. 205; *Lord Stourton v. Sir Thomas Meers*, 1 P. Wms. 146; *Clay v. Rufford*, 5 DeG. & Sm. 784; *Devenish v. Brown*, 26 L. J. (N. S.) Ch. 23. In *Coffin v. Cooper*, *supra*, it was held, that the vendee could not insist on being discharged from the contract, the vendor having obtained a good title through an act of parliament, although more than a month after the master's report. Lord ELDON said: "Where the master's report is, that the vendor, getting in a term, or getting administration, etc., will have a title, the court will put him under terms to procure that speedily."

(5) See *Murrell v. Goodyear*, 1 DeG. F. & J. 432, and other cases cited *ante*, § 349.

for a specific performance, and does not make out a good title until after the commencement of his suit, he may, according to the practice of the English court of chancery, be liable to a portion of the costs.(1)

SEC. 423. The general doctrines of the court with respect to delay in completing by the vendor, and especially the rule which permits him to make out his title after the time specified in the contract, and still enforce a performance upon the purchaser, being opposed to the actual and literal meaning of the agreement, and being sometimes capable of working unjustly, or at least harshly, are never, at the present day, extended by implication beyond the limits which have already been firmly established, but are carefully restricted to cases and circumstances which present the same class of questions as those which have already been adjudicated. For this reason the vendor, whose title is not perfected at the time of commencing his suit, cannot force a performance upon the vendee, and compel him to accept, whenever it is necessary, in order to complete the matter, that a new suit should be brought, or whenever an account of debts must be taken in order to ascertain and fix the rights of the parties to the existing suit.(2)

SEC. 424. There are many modes, however, in which the vendee, by his acts or omissions, will waive all right to object to the vendor's delay in making out a good title, and when the delay is thus waived the vendee will be compelled to accept the title, and complete the contract notwithstanding the lapse of time. He thus waives all objection to the delay, if he knows of the defects at the time of making

(1) This question would doubtless be regulated by the system of procedure prevailing in each state. By the practice of the English chancery, such a vendor would, when the fault or misfortune was his own, be obliged to pay all the costs up to the time when he showed a good title. *Long v. Collier*, 4 Russ. 269; *Scoones v. Morrell*, 1 Beav. 251; *Wilkinson v. Hartley*, 15 Beav. 183. But there are exceptions to this rule, and the vendor would not be charged with costs, although his title was not perfected until after filing his bill, where the suit was made necessary solely by the vendee's conduct; as, for example, where the vendee did not question the title, but disputed the vendor's authority to sell (*Peers v. Sneyd*, 17 Beav. 151); or where the vendee did not make any requisition—that is, objections and demands for explanations, further proof, removal of incumbrances, and the like—until after the suit was commenced, or where the vendee had, without any good ground, claimed compensation. *Lyle v. Earl of Yarborough*, Johns. 70. But see, on the question of plaintiff's liability for costs, *Phillipson v. Gibbon*, L. R. 6 Ch. 428.

(2) *Lechmere v. Brasier*, 2 J. & W. 289; *Dalby v. Pullen*, 3 Sim. 29; 1 Russ. & My. 296; *Coster v. Turnor*, 1 Russ. & My. 311; *Magennis v. Fallon*, 2 Moll. 566, 580; *Chamberlain v. Lee*, 10 Sim. 444; *Blacklow v. Laws*, 2 Hare, 40; *Fraser v. Wood*, 8 Beav. 339.

the agreement, and thus has notice that a delay in perfecting the title is probable, or if he accepts, without objection, the abstract which is delivered to him after the stipulated day; (1) or if he goes on with the negotiation or dealing concerning the title, or concerning the completion of the contract generally, after the time which had been prescribed for the completion, even though it will require a much longer time before the title can be perfected, and the transaction consummated. (2) If a purchaser, at the request of the vendor, extends the time of completing the contract for a definite period, he does not thereby waive his right to object to any additional amount of delay; and if the vendor has not made good his title so as to be ready at the end of the enlarged period, he may treat the contract as ended and abandon it. (3) It was said in one case that if the vendee goes on with the negotiation and dealing *under protest*, he does not waive his objection to the vendor's delay; (4) but this opinion is not reconcilable with the principle of the cases already cited. (5)

SEC. 425. The right to enforce a contract may be terminated by notice and acquiescence. If one of the parties notifies the other that he shall treat the contract as at an end, or will not regard himself as bound by it, and will not perform, and the party, who receives the notification, neglects to enforce his right under the agreement by taking prompt steps in the way of compelling an execution, he will be considered as acquiescing in the notice, and as abandoning his equitable right to the remedy of specific performance. (6) The time specified in the contract for presenting objections to the title may be enlarged by the vendor's assent, (7) or by his conduct. (8)

(1) *Seton v. Slade*, 7 Ves. 265; *Pincke v. Curteis*, 4 Bro. C. C. 329; *Hipwell v. Knight*, 1 Y. & C. Ex. 401.

(2) *Wood v. Bernal*, 19 Ves. 220; *Smith v. Barnam*, 2 Anstr. 527; *Paine v. Meller*, 6 Ves. 349; *Ward v. Jeffery*, 4 Price, 294; *Smith v. Sir Thomas Dolman*, 6 Bro. P. C. 291 (Toml. ed.); *Ex parte Gardner*, 4 Y. & C. Ex. 503; *Wood v. Machu*, 5 Hare, 158; *Hoggart v. Scott*, 1 Russ. & My. 293.

(3) *Parkin v. Thorold*, 2 Sim. (N. S.) 1; but see S. C., 16 Beav. 59.

(4) *Magennis v. Fallon*, 2 Moll. 576.

(5) See *ante*, § 418. In *Marquis of Hertford v. Boore*, 5 Ves. 719, a contract had lain dormant fourteen months, but had not been formally abandoned, and it was specifically enforced; but see *Milward v. Earl of Thanet*, 5 Ves. 720; *Garrett v. Lord Besborough*, 2 Dr. & Walsh, 441.

(6) *Guest v. Homfray*, 5 Ves. 818; *Heaphy v. Hill*, 2 S. & S. 29; *Watson v. Reid*, 1 Russ. & My. 286; *Walker v. Jeffreys*, 1 Hare, 341.

(7) *Cutts v. Thodey*, 12 Sim. 205.

(8) *Upperton v. Nickolson*, L. R. 6 Ch. 435.

SEC. 426. The vendor may also destroy his equitable right to enforce the contract by conduct inconsistent with its terms, and injurious to the vendee. Thus, when the contract was for the purchase of a dwelling-house, so that immediate possession was an essential element of the agreement, and the vendor turned the purchaser out of the possession, he was held to have thereby abandoned the contract, and a specific performance at his suit was refused.(1) On the other hand, whenever it appears reasonably probable, from the circumstances of the case—as for instance, from the vendee's bankruptcy, or from his death and the inability of his personal representatives to collect his personal property, that if the vendor completes on his own part, the price will not be paid without a very long delay—and *a fortiori*, if it will not be paid at all—then the vendor may, for his own protection, treat the agreement as rescinded, and successfully resist a specific enforcement.(2) Where a suit by the vendor is dismissed solely on account of his laches in bringing it, without passing upon the validity of his title, the rule is settled in England that the court of equity will not, as a part of its adjudication, order the deposit money to be returned to the vendee, but will leave the right and liability as to such repayment to be determined by an action at law.(3)

SEC. 427. 3. *The rights of the parties to interest or to the rents and profits when there has been a delay in the performance.*—A number of special rules have been settled by the English decisions respecting the equitable mode of adjusting the compensation to one or the other of the parties in case of delay, consisting generally of interest payable to the vendor, or of rents and profits, or an occupation value allowed to the vendee. These rules are, of course, based upon the forms of

(1) *Knatchbull v. Grueber*, 3 Meriv. 124. But the effect of the vendor's conduct must always depend very largely upon the circumstances of each case, for what would be inequitable in one instance might be perfectly proper in another. Thus in *Colby v. Gadsden*, 34 Beav. 416, 420, the contract was to be completed at a specified time, and from that time the vendee was to receive the rents and profits, and was to pay interest on the purchase-money; the purchaser was let into the receipts of the rents and profits without his payment; the vendor afterwards finding out that he got and could get neither the price nor the interest, as stipulated, notified the tenants who were in actual possession to pay no more rent to the vendee; the vendor sued for a specific performance, and it was held that this act of his was not, under the circumstances, an abandonment of the contract, and was no obstacle to a decree in his favor.

(2) *Whittaker v. Whittaker*, 4 Bro. C. C. 31; *Sir James Lowther v. Lady Andover*, 1 Bro. C. C. 396; *Mackreth v. Marlar*, 1 Cox 259; *Rowe v. Young*, 3 Y. & C. Ex. 199.

(3) *Southcomb v. Bishop of Exeter*, 6 Hare, 225.

contract which prevail in that country. In England the contract ordinarily seems to provide that on a certain future day named it shall be completed by a delivery of possession to the vendee and the execution of whatever conveyance is necessary, and at the same time the purchaser is to pay the price, or if all is not then payable, that he is to pay the stipulated portion, and give the security for the remaining part, as agreed. In the meantime the land remains in the possession of the vendor, and until the time for completion and payment arrives, the purchaser does not ordinarily pay interest upon the price. The interval between the date of concluding the contract and that of completing it, is given in order that the title may be made out and shown by the vendor and examined and approved by the vendee. This, I say, seems to be the ordinary form, but is, of course, subject to variation in particular cases, according to the agreements of the parties. If when the time for completion arrives the purchaser is ready and willing to make his payment, but the vendor is unable to perform on his part because he has not yet perfected his title, and the completion is therefore postponed, it is highly just and equitable that the rents and profits accruing after that day, and up to the subsequent day, when the contract is carried into effect, should be allowed to the vendee in the settlement as an abatement from his purchase-price, or should be paid over to him; and sometimes, when the vendor has been much in fault it would be just that he should pay the vendee a sum as occupation rent for the premises, since from the day named for the completion, the vendee *ought* to have been in possession and in the receipt of the rents and profits. On the other hand, if at the day for completion the vendor is ready, but the vendee fails in his payment, and only succeeds in making his payment at a subsequent time, it is manifestly just that he should be forced to add interest on the price for the period of his delay. It will be seen that the English decisions have laid down general rules applicable to the foregoing conditions, and have also announced other special rules with respect to particular stipulations, or exceptional acts of the parties.

SEC. 428. It is not probable that these rules will be often cited and enforced by American courts, since the forms of contract customarily used in this country, and the methods of conducting the business operations of transferring land are so unlike those which prevail in England. Still, as these rules are not arbitrary, but are based upon the plainest principles of equity, there is no reason why they should not be adopted by the American courts in deciding upon the rights of parties under contracts similar in their form and provisions to those



by which land is sold or leased in England. If the facts and circumstances are strictly analogous, then there is every reason why the rules should be followed. Still it must be conceded at once that they are not adapted to the agreements for the sale of lands commonly employed in the United States. In the vast majority of cases, the American agreement, whatever be its external form — whether a title bond, articles, land contract, or otherwise—provides that the vendee shall have possession, and, of course, the pearnancy of the rents and profits immediately upon the conclusion of the contract, that he shall pay a portion of the price at the same time (although this is sometimes omitted), and that the balance of the price (or sometimes all of it) shall be paid in a specified number of future installments, with interest on the whole balance remaining unpaid, payable with each installment, and when these payments are completed, the vendor is to give a deed of conveyance. One variation from this form is not uncommon, namely, that after a certain portion of the price is paid, either in hand or by installment, the vendor is to convey and the vendee is to secure the balance of the purchase-money, with interest, by a mortgage upon the premises themselves. It will be seen that, in case of a delay in completion by the default of either party, the compensation is already provided for, without any special direction of the court, by the very terms of the agreement. And this is always equitable and just. If the vendor is in fault, and delays to convey the legal title, the vendee does not generally lose anything substantial by the delay; he has the possession all the time, and the rents and profits, and it is right and fair that he should pay interest on the purchase-money until the whole is paid up. If the vendee is in default and causes the delay, the vendor still obtains his interest, which equity has determined to be a sufficient compensation for a delay in making pecuniary payments. It appears, therefore, that in all ordinary cases, there is no opportunity and no need of applying the English rules concerning compensation for delay to American contracts. Still, as cases may arise in this country to which these English rules will be applicable, I shall give their substance in a brief manner. Cases may arise under the common form of the American contract, which call for the settlement of general doctrines concerning compensation, but they do not belong to the subject of specific performance, and do not, therefore, fall within the scope of this work. For example: When the vendee has taken possession under his contract, and has received the rents and profits of the land, but utterly fails in making the stipulated payments, so that the vendor is entitled to rescind and recover

back the premises. Here he is undoubtedly entitled to a proper compensation for the vendor's possession and use of the land during the interval; but such compensation forms no element of a suit for specific performance; it assumes that the contract is not to be performed but is avoided, and it is recoverable in an action at law. With these preliminary remarks, by way of explanation, I proceed to state the results of the English decisions upon this particular topic.(1)

SEC. 429. The general rule is well settled that, where the contract is not completed until after the time stipulated for that purpose, but the court nevertheless decrees a specific performance, it will adjust the equities of the parties by placing them as far as possible in the same position which they would have occupied had the agreement been completed at the prescribed day, and to that end it will allow to the purchaser the rents and profits, and to the vendor interest upon the purchase-price from and after that date.(2)

(1) In *Lombard v. Chicago Sinai Congregation*, 75 Ill. 271, the principle of the English rule, as given in the cases cited below, was fully adopted. The contract was for the sale of a house and lot, and the vendor was to furnish a satisfactory abstract of title, at a specified time, which was not done, and thereby a delay was caused. In the decree it was provided that the vendor should be left in possession of the rents and profits until a good title was shown, and from that time only should the vendor be entitled to interest upon the price; after that time the vendee should be required to pay the interest specified in the contract, and the vendor should be required to account for reasonable rents and profits, although none had actually been received, because the building was destroyed by fire after the conclusion of the contract. In *Drake v. Barton*, 18 Minn., 462, it was decided, in accordance with the general understanding and practice in respect to agreements for the sale of lands in the United States, that if the contract is silent on the subject, the vendee is entitled to immediate possession of the land, and the vendor is entitled to interest on the purchase-price from the time of concluding the agreement. In *King v. Ruckman*, 9 C. E. Green, 298, 556, it was held that when a vendor refuses to convey, and keeps the vendee out of possession, and the rents and profits of the land are less than the interest on the price, the vendor is not entitled to interest on the purchase-money accruing prior to his conveyance. In such a case the vendor will keep the rents, and the vendee need not pay interest.

(2) *De Visme v. De Visme*, 1 Hall & Tw. 418; 1 Mac. & G. 346; *Sir James Lowther v. Countess of Andover*, 1 Bro. C. C. 396; *Davy v. Barber*, 2 Atk. 490; *Owen v. Davis*, 1 Ves. 82; *Monro v. Taylor*, 8 Hare, 70; 3 Mac. & G. 713; *Grove v. Bastard*, 1 De G. M. & G. 69; *Bailey v. Collett*, 18 Beav. 179; *Phillips v. Sylvester*, L. R. 8 Ch. 173; *Leggott v. Metropolitan R'y Co.*, L. R. 5 Ch. 716; in *Phillips v. Sylvester*, L. R. 8 Ch. 173, the trustees of a deceased vendor sued for a specific performance; vendee did not deny his obligation, and was willing all the time to complete, but claimed that the contract included a certain additional piece of land. The vendors (plaintiffs) had a decree *not* embracing this piece. Plaintiffs had not allowed the vendee to take possession, and had suffered the land to lie waste. *Held*, affirming the M. R. that the defendant must be allowed to set off against the interest payable by him, the amount of rent which might have been

SEC. 430. In ordinary contracts, which contain no stipulations concerning the payment of interest, and do not specify any day for completion, the purchaser is generally liable to pay interest on the purchase-money from the time when he takes the possession, especially if he has received the rents and profits.(1) If, however, there is a strong objection to the title, the purchaser is not bound to take possession and pay interest until the doubt is removed.(2) In a contract for the sale of a reversion, which is silent respecting interest, interest is payable from the time appointed for completion, without regard to the possession.(3)

received from the land, and the amount of deterioration of the land, citing *Ferguson v. Tadman*, 1 Sim. 530; *Binks v. Lord Rokeby*, 2 Sw. 222; *Minchin v. Nance*, 4 Beav. 332; *Sherwin v. Shakespear*, 5 De G. M. & G. 517. In *Leggett v. Metropolitan R'y Co.*, L. R. 5 Ch. 716, the vendor sued and had a decree. *Held*, that the vendee was not entitled to any abatement by the way of occupation rent, on the ground that plaintiff had retained the possession after the time when the possession was to have been delivered by him and the price paid by the defendant, since the defendant had not paid the price at that time, and plaintiff had been compelled to sue for a specific performance, per *JANES, L. J.*, p. 719: "No doubt it is the ordinary rule between the vendor and the purchaser, that after the time fixed for completion the vendor is entitled to interest, and the purchaser to the rents and profits;" but this rule was held not to apply under the special facts of the case and the default of the vendee. The vendee is liable for the interest, as stated in the text, even when the purchase-money has lain all the time in his hands "dead"—that is, unused, idle, and producing no interest, income, or profit, provided the delay was caused by his default. *Calcraft v. Roebuck*, 1 Ves. 221; *Enraght v. Fitzgerald*, 2 Ir. Eq. Rep. 87; but not when the delay was caused by the vendor's fault. *Howland v. Norris*, 1 Cox, 59. But even in the last case, if the vendee would escape the liability to pay interest, he must actually set aside the money and appropriate it for the vendor; must not in any way derive a benefit from it, and must notify the vendor of these facts, and that the money is thus lying idle. *Calcraft v. Roebuck*, 1 Ves. 221; *Powell v. Martyr*, 8 Ves. 146; *Roberts v. Massey*, 13 Ves. 561; *McCann v. Forbes*, 1 Hogan, 13; *Dyson v. Hornby*, 4 DeG. & Sm. 481; *Kershaw v. Kershaw*, L. R. 9 Eq. 56; *Regents Canal Co. v. Ware*, 23 Beav. 575. Since, if the vendee does not set apart and appropriate the money, or if he derives any benefit from it, he must pay interest, although the delay is the vendor's. *Winter v. Blades*, 2 S. & S. 393.

(1) *Ex parte Manning*, 2 P. Wms. 410; *Birch v. Joy*, 3 H. L. Cas. 565; *Smith v. Dolman*, 6 Bro. P. C. 291 (Toml. ed.); *Powell v. Martyr*, 8 Ves. 143, 149; *Fludger v. Cocker*, 12 Ves. 25; *Binks v. Lord Rokeby*, 2 Sw. 222, 226; *Att'y-Gen. v. Christ Church*, 13 Sim. 214; but see *Blount v. Blount*, 3 Atk. 636.

(2) *Forteblow v. Shirley*, cited 2 Sw. 223; *Carrodus v. Sharp*, 20 Beav. 56.

(3) It is said: "Upon the sale of a reversion, the time at which the purchaser takes possession has nothing to do with the question of interest on the purchase-money. The advantage obtained by the delay, and wearing out of the previous life interests, is equivalent to the receipt of the rents of a property in possession. *Bailey v. Collett*, 18 Beav. 179, 182; *Davey v. Barber*, 2 Atk. 490; *Owen v. Davies*, 1 Ves. 82.

SEC. 431. These general rules are, of course, liable to be modified if the contract contains express provisions concerning the payment of interest. Such provisions will govern, unless the vendor by his own unreasonable delay forfeits his right to claim the interest as stipulated to be paid.(1) Where the contract stipulates that interest is to be paid by the vendee "from whatever cause the delay may arise," or words to that effect, and the delay is caused by the vendor's fraud or willful neglect, then if the interest exceeds the rents and profits, the vendor will be left in the enjoyment of the rents and profits, while the vendee will be excused from payment of interest until a good title is shown; from and after that time the vendee must pay the interest and receive the rents and profits.(2) But under the same form of contract if the delay arises from the defective title, or the difficulty of making out a good title, without any fraud or willful neglect of the vendor, the purchaser's interest must be paid in pursuance of the agreement.(3)

SEC. 432. If, during his delay in perfecting or making out a good title, the vendor causes or permits the property to become deteriorated in value, either by postive mismanagement, or by using it in an un-

(1) In *Herbert v. Salisbury, etc., R'y Co.*, L. R. 2 Eq. 221, the vendee agreed in the contract to pay a high rate of interest if it was not completed at a certain day. The completion was delayed a long time, but *not* by reason of the vendor's misconduct or negligence. *Held*, the vendee was bound to pay the stipulated interest. In *Williams v. Glenton*, L. R. 1 Ch. 200, the contract stipulated that the vendee was to pay interest in case of a delay in completion "for any cause." The vendee was compelled to pay interest, although the delay was caused by the vendor's inability to give a good title at the time agreed, and he had maintained a long litigation in order to perfect his title. In *Kershaw v. Kershaw*, L. R. 9 Eq. 56, the land was sold for 38,500*l.*, and the vendee agreed to pay interest on it until the time when the price itself was paid, and he was put in possession. Some disputes subsequently arose in the process of completing the contract, and the vendee deposited in a bank to a separate account the sum of 38,000*l.*, and notified the vendors that he had appropriated this sum for the purposes of the purchase, and that should not pay interest on it under the contract. The vendors disputed the sufficiency of his notice, but made no objection because the sum deposited was 500*l.* less than the price. The vendee, as soon as he noticed this deficiency, deposited 500*l.* more with the 38,000*l.*, together with interest on it up to that time. *Held*, that the vendee was not liable for any interest after the date of his original deposit of the 38,000*l.*

(2) *Vickers v. Hand*, 26 Beav. 630.

(3) *Esdaile v. Stephenson*, 1 S. & S. 123; *Williams v. Glenton*, L. R. 1 Ch. 200; 34 Beav. 528; 13 W. R. 1030; *Rowley v. Adams*, 12 Beav. 476; *Sherwin v. Shakspeare*, 5 DeG. M. & G. 517; *Bannerman v. Clarke*, 26 L. J. (N. S.) Ch. 77; *Lewis v. South Wales R'y Co.*, 10 Hare, 113; *Vickers v. Hand*, 26 Beav. 630 (overruling *De Visme v. De Visme*, 1 Mac. & G. 336); *Lord Palmerston v. Turner*, 33 Beav. 524.

husband-like manner, or by waste, active or passive, or by dilapidation, the vendee, on the settlement, will be allowed a compensation for the injury ;(1) and if he has already paid the purchase-price, under an order of the court, he will also be allowed interest on the compensation, calculated from the date of the payment of the price.(2) When the deterioration occurs after the time when the purchaser has taken possession, or ought to have taken possession, he is not entitled to compensation ;(3) nor when it is caused by his own act or omission.(4) Timber accidentally falling—*e. g.*, blown down—after the date of the contract, belongs to the vendee.(5) If the vendor cuts any ordinary timber after the date of the contract, the purchaser is entitled to compensation therefor ;(6) while, if the vendor cuts ornamental timber after that time, the vendee can, on that account, rescind the contract.(7) If the vendor voluntarily makes improvements upon the land, after he has entered into a contract for its sale, the purchaser is not bound to reimburse him for his outlays, or to repay him for their value.(8) Where the contract is silent upon the subject, the vendor is chargeable with all the expenses and “outgoings” of the land which he has agreed to sell from the date of the contract to the time when the vendee might take possession, which is the time of showing a good title ; and he cannot, of course, claim to be reimbursed by the purchaser.(9)

(1) *Foster v. Deacon*, 3 Madd. 394 ; *Phillips v. Sylvester*, L. R. 8 Ch. 173 ; 20 W. R. 406 ; *Lord v. Stephens*, 1 Y. & C. Ex. 222 ; 3 Y. & C. Ex. 503 ; *Carrodus v. Sharp*, 20 Beav. 56.

(2) *Ferguson v. Tadman*, 1 Sim. 530.

(3) *Binks v. Lord Rokeby*, 2 Sw. 226 ; *Phillips v. Sylvester*, 20 W. R. 406 ; *Minchin v. Nance*, 4 Beav. 332.

(4) *Harford v. Purrier*, 1 Madd. 532, the vendee caused a tenant to leave before the completion of the contract.

(5) *Poole v. Shergold* 2 Bro. C. C. 118 ; 1 Cox 273.

(6) *Magennis v. Fallon*, 2 Moll. 588.

(7) *Magennis v. Fallon*, *supra*.

(8) *Master of Clare Hall v. Harding*, 6 Hare, 296 ; *Monro v. Taylor*, 8 Hare, 60 ; *Sherwin v. Shakspeare*, 5 De G. M. & G. 517.

(9) *Carrodus v. Sharp*, 20 Beav. 56. In *Lawes v. Gibson*, L. R. 1 Eq. 135, property held by lease was agreed to be transferred, and the lease assigned by the lessee to a purchaser, the agreement providing that possession should be given Nov. 14, 1864, all ‘outgoings’ up to that day being cleared by the vendor.” *Held*, on a suit by the vendor, that the rent of the premises payable for their use to the lessor, accruing since the last quarter-day, up to November 14, was an “outgoing,” and the amount of it should be allowed to the vendee. That is, as this rent would not be actually due and payable until the *end* of the quarter, which was some time *after* November 14, and then the vendee being assignee of the lease would be obliged to pay the entire quarter’s rent, although

SEC. 433. Special rules are established in England in respect of land sold by order of the court, which, being entirely a part of their system of administering landed estates, have probably no application or force in this country. Where an estate in possession is sold by order of the court, the rents and profits from the quarter-day next before the date of the sale are allowed to the vendee, and he must pay the purchase-price before the next quarter after the sale.(1) When a reversionary estate is thus sold, the date of confirming the report of sale absolute is the one at which the rights are considered as fixed; the vendee is bound to pay interest from that day, and is entitled to any appreciation in the value of the estate arising from the death of persons upon whose lives the precedent estate or estates are limited, which may happen subsequent to that day.(2)

## SECTION IV.

### *Partial specific performance, and compensation.*

SECTION 434. When the vendor's title proves to be defective in some particulars, or his estate is different from that which he agreed to convey, or is subject to incumbrances or outstanding rights in third persons, or the subject-matter—generally the land—is deficient in quantity, quality, or value, it is plain that the contract cannot be specifically performed, according to its exact terms, at the suit of either party. In such a case there are only three possible alternatives for a court of equity to pursue; either to refuse its remedy entirely; or to enforce the contract without any regard to the partial failure, compelling the purchaser to take what there is to give and to pay the full

he had been in possession only since November 14; therefore the vendor should, for purpose of reimbursement, allow him the amount of the rent accruing between the commencement of the quarter and November 14. See, also, *Cud-don v. Tite*, 1 Giff. 335.

(1) *Mackrell v. Hunt*, 2 Madd. 34 n., but he is not allowed to deduct the property tax. *Holroyd v. Wyatt*, 1 DeG. & Sm. 125.

(2) *Ex Parte Manning*, 2 P. Wms. 410; *Davy v. Barber*, 2 Atk. 489; *Child v. Lord Abingdon*, 1 Ves. 94; *Champernowne v. Brooke*, 3 Cl. & Fin. 4; 4 Cl. & Fin. 589; 2 Y. & C. Ex. 510; 3 Y. & C. Ex. 505; *Wallis v. Sarel*, 5 DeG. & Sm. 429; in *Trefusis v. Lord Clinton*, 2 Sim. 359, interest was ordered to be paid from the date of the purchase, contrary to the general rule. See *Robertson v. Skelton*, 13 Beav. 91. *Blount v. Blount*, 3 Atk. 636, is said to be misreported. In respect to these special English rules, see *White & Tudor's Lead. Cas. in Eq.* vol. 2, pp. 1057-1060 (4th Am. ed. of 1877), from which they are compiled.

price as agreed; or, to decree a conveyance of the vendor's actual interest, and allow to the vendee a pecuniary compensation or abatement from the price, proportioned to the amount and value of the defect in title or deficiency in the subject-matter. In determining which of these alternatives to adopt, it is evident that, under all ordinary circumstances, the second one would be extremely unjust and inequitable, and yet it is occasionally resorted to when the vendee is not in a situation which entitles him to favorable consideration. The first alternative might often contravene the wishes and interests of both the parties, and cannot therefore be taken as the general, or, at least, universal rule. Still, if the deficiency or defect is large and material, and the purchaser is unwilling to accept a partial performance, this alternative must be adopted. The third is based upon equitable principles; it endeavors to preserve the rights of both the parties, and is therefore constantly resorted to and applied by courts of equity in aid of a vendee, and sometimes, although under more and greater restrictions, in aid of the vendor. There are circumstances, however, under which even a vendee is not allowed to avail himself of its doctrine.

SEC. 435. If the purchaser is willing and desirous to take the partial interest which the vendor can convey, and especially if he is the party calling upon the court for relief, there can be but little difficulty in granting him the remedy of performance, with a reasonable compensation for the defects. The great difficulty arises when the vendor asks the court to compel the purchaser to accept the partial interest, with a compensation, and the defendant objects to any decree; or when the vendor asks the court to enforce the contract without compensation, while the vendee, not absolutely refusing to accept the conveyance, insists that compensation should be allowed him as an incident of the relief. The solution of this difficulty always turns upon the nature and extent of the defect which inheres in the vendor's title or in the subject-matter. If the vendor is unable to perform the agreement upon his part in respect of some substantial, material provision or feature, then, as has been heretofore shown, he cannot obtain a decree for any relief against an unwilling purchaser. If the vendor's non-performance is not substantial and material, but is a mere failure to carry out the terms with exact and literal accuracy, so that he is really able to do in substance all that he undertook, then, as has been already stated, he may come into court as an *actor* and compel the vendee to accept his performance, and to carry the contract into execution, sometimes with, and even sometimes without, any

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compensation. The practical difficulties which meet the courts in administering this general doctrine, arise from the necessity of deciding in each case, or class of cases, whether the vendor's defect, or, in other words, failure to perform, is substantial, or is only immaterial and formal. Still, the great number of decisions which have been made, furnish the means of discovering and arranging certain rules which are now recognized and constantly followed by the courts of equity.

SEC. 436. Before proceeding with the discussion, it may be proper to point out the distinction between the "compensation" which is allowed as a part of the decree for a specific performance, and "damages" to which one of the parties, usually the vendee, may be entitled for a complete or partial breach of the contract. A court of law may always give damages in an action properly brought for that purpose. A court of equity may, also, under special circumstances, entertain a suit, and award a decree for damages alone when a decree for a specific performance has been made impossible by the conduct of the defendant; and it may also, under very peculiar circumstances, grant damages to the plaintiff as an incident of its equitable remedy of specific performance, although the jurisdiction to award this relief in both these cases was at one time denied by the courts of equity.<sup>(1)</sup> Still, this relief of damages is only given in exceptional cases, and purely as ancillary to the equitable remedy, when the court has already obtained jurisdiction of the case by virtue of its equitable powers, and determines to do full justice to the party in one cause, instead of compelling him to commence a separate litigation in a court of law. "Compensation," on the other hand, using the word in its special and restricted meaning, is an ordinary and constant incident of the remedy of specific performance, a part of the general course of administering the doctrines of equity, and is to be regarded, not as an independent and separate award of damages, but rather as a condition upon which the relief of specific performance is granted at all, or as a modification of that relief, so that it may be adapted to the circumstances of the case and the equities of the parties. Although the amount of compensation may be ascertained upon somewhat the same basis as that upon which damages would be assessed for the same loss, yet

(1) See *Cleaton v. Gower*, cases temp. Finch, 164; *City of London v. Nash*, 3 Atk. 512; *Todd v. Gee*, 17 Ves. 278; *Jenkins v. Parkinson*, 2 My. & K. 5; *Prothero v. Phelps*, 25 L. J. Ch. 105, 108, per TURNER, L. J.; *Morss v. Elmendorf*, 11 Paige, 277, per WALWORTH, Ch.; *Hatch v. Cobb*, 4 Johns. Ch. 559, per KENT, Ch.; *Kempshall v. Stone*, 5 id. 193; *Woodward v. Harris*, 2 Barb. 439; *Wiswall v. McGowan*, 1 Hoff. Ch. 125; *Story Eq. Jur.* § 798; *Robertson v. Hogsheads*, 3 Leigh, 667.



the motives and principles upon which compensation is allowed are wholly different from those upon which damages are awarded. The subject of damages, instead of, or as an incident of, a specific performance, will be examined in a subsequent section, and no further allusion will be made here than this distinction between it and "compensation."

SEC. 437. As has already been indicated, the courts of equity are governed by different considerations and doctrines in their award of compensation in the two cases where the vendee and the vendor, respectively, are the actors who demand the general relief of a specific performance. These two cases must, therefore, be discussed separately. It must be noticed that I do not say, where the vendee or vendor is the plaintiff, although in applying the rules to be hereafter stated, the party asking relief generally is the plaintiff. But under the system of procedure now prevailing over a large part of this country as well as in England, the party asking the remedy may be the defendant in the actual suit, and may set up his right of action as a "counter-claim" or demand for affirmative relief. I, therefore, employ a term which will include both of these positions, and have to consider: 1, the case in which the vendee; and 2, that in which the vendor is the actor.

SEC. 438. *I. Where the vendee is the actor, demanding a partial specific performance, or a specific performance with compensation.*—The general doctrine is firmly settled, both in England and in this country, that a vendor whose estate is less than or different from that which he agreed to sell, or who cannot give the exact subject-matter embraced in his contract, will not be allowed to set up his inability as a defense against the demand of a purchaser who is willing to take what he can get with a compensation. The vendee may, if he so elect, enforce a specific performance to the extent of the vendor's ability to comply with the terms of the agreement, and may compel a conveyance of the vendor's deficient estate, or defective title or partial subject-matter, and have compensation for the difference between the actual performance, and the performance which would have been an exact fulfillment of the terms of their contract. Or, to state the doctrine in language used by Lord Eldon in a leading case: "If a man having partial interests in an estate, chooses to enter into a contract representing it and agreeing to sell it as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety, and, therefore, the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting

under those circumstances, is bound by the assertion in his contract, and if the vendee chooses to take as much as he can have, he has a right to that and to an abatement, and the court will not hear the objection by the vendor, that the purchaser cannot have the whole.<sup>(1)</sup> There are exceptions to this general doctrine, which will be stated in subsequent paragraphs.

SEC. 439. The foregoing doctrine has been applied in numerous instances. When a person who owns only an undivided share of a tract of land enters into an agreement to sell the whole, as though he was owner of the entirety, to a purchaser who is ignorant of any

(1) In *Mortlock v. Buller*, 10 Ves. 315; also, in support of the doctrine, *Lord Bolingbroke's Case*, 1 Sch. & Lef. 19, n. a; *Nelthorpe v. Holgate*, 1 Coll. 203; *Barrett v. Ring*, 2 Sm. & G. 43; *Wilson v. Williams*, 3 Jur. (N. S.) 810; *Barnes v. Wood*, L. R. 8 Eq. 424; *Walters v. Travis*, 9 Johns. 450; *Morss v. Elmendorf*, 11 Paige, 237; *Voorhees v. De Myer*, 3 Sandf. Ch. 614; 2 Barb. 37; *Wiswall v. McGowan*, 1 Hoff. Ch. 125; *Napier v. Darlington*, 20 P. F. Smith, 64; *Erwin v. Myers*, 10 Wright, 96; *Clark v. Reins*, 12 Gratt. 98, 112; *Nagle v. Newton*, 22 Gratt. 814; *Evans v. Kingsberry*, 2 Rand. 120; *Stockton v. Union Oil Co.*, 4 W. Va. 273; *Jacobs v. Lock*, 2 Ired. Eq. 286; *Harbers v. Gadsden*, 6 Rich. Eq. 284; *Wetherford v. James*, 2 Ala. 170; *Bass v. Gilliland*, 5 Ala. 761; *Matthews v. Patterson*, 2 How. (Miss.) 729; *Jones v. Shackelford*, 2 Bibb, 410; *Williams v. Champion*, 6 Hammond, 169; *McConnell v. Brillhart*, 17 Ill. 354; *Beyer v. Marks*, 2 Sweeny, 715; *King v. Ruckman*, 5 C. E. Green, 316; *Spalding v. Alexander*, 6 Bush, 160; *Howard v. Kimball*, 65 N. C. 175; *Marshall v. Caldwell*, 41 Cal. 611; *Pigree v. Coffin*, 12 Grey, 316; *Gilbert v. Peteler*, 38 Barb. 517; *Luckett v. Williamson*, 37 Mo. 388; *Bell v. Thompson*, 34 Ala. 633; *Collins v. Smith*, 1 Head, 251; *Wright v. Young*, 6 Wisc. 127; *Ackerman v. Ackerman's Ex'rs*, 9 C. E. Green, 315; *Wilson v. Cox*, 50 Miss. 133; *Zebley v. Sears*, 38 Iowa, 507; *Harding v. Parshall*, 56 Ill. 219. The recent case of *Barnes v. Wood*, L. R. 8 Eq. 424, is a very strong one. The plaintiff A. (the vendee) contracted with defendant B. for the purchase of certain property in fee, being ignorant that B. had only a life estate, and that C. (B.'s wife) was entitled to the remainder in fee on the determination of the life estate. Defendant D., with full knowledge of this contract, took a conveyance from B. and C., so acknowledged by C. as to pass all her interest. A. sues for a specific performance against B. and D. *Held*, entitled to a conveyance from D. of B.'s interest, with compensation in respect of C.'s (the wife's) interest, which B. would have been unable to convey without her consent—*i. e.*, an abatement from the price. It should be noticed that A. was ignorant of any defect in B.'s interest. In *Waters v. Travis*, 9 Johns. 450, the vendor contracted to sell a piece of land, and afterwards conveyed a part of it to a third person. The vendee suing for a specific performance, the vendor (defendant) claimed that the court could not enforce the contract which the parties made, and could not make another and different one for them, and, therefore, must dismiss the plaintiff's suit. But the chancellor and the court of errors held that defendant could not be heard to allege his own wrongful act as a reason for not complying with the plaintiff's demand, which, but for such act, would have been without any answer, and that the purchaser could compel a conveyance of the remaining portion of the land which the vendor still owned.

defect in the title, such vendee may compel a conveyance of the share which the vendor actually owns, and have compensation for the residue, or he may rescind the agreement at his election. The same is true where there is a material deficiency in the quantity of land contracted to be sold, unless by the language of the agreement the purchaser expressly or impliedly assumes the risk as to quantity.(1)

(1) *Atty.-Gen. v. Day*, 1 Ves. Sen. 218; 1 V. & B. 353; *Western v. Russell*, 3 V. & B. 187; *Napier v. Darlington*, 20 P. F. Smith, 64; *Clark v. Reins*, 12 Gratt. 98. In *Erwin v. Myers*, 10 Wright, 96, the doctrine was fully stated by STRONG, J., with a reference to leading authorities, and I quote from his instructive opinion. The vendor had contracted to sell the whole piece of land, but it turned out that he was owner of only an undivided half, and could only convey that part. The judge said: "The vendee may rescind the contract, or, at his election, may bring an action at law for damages, or may institute a suit in equity to enforce specific performance. His position is not to be confounded with that of a vendor praying in equity for a specific performance. There is a settled distinction between the two cases. If a vendor cannot make out title to the whole of the subject-matter of a contract, equity will not compel the vendee to perform *pro tanto*. But, says MR. SUGDEN (*Sug. on Vendors*, 193): 'When a vendee seeks a specific execution of an agreement, there is much greater reason for affording the aid of the court to a purchaser when he is desirous of taking the part to which title can be made. And a purchaser may, in some cases, insist upon having the part of an estate to which a title is produced, although the vendor could not compel him to purchase it.' (The language of Lord ELDON, in *Mortlock v. Buller*, before cited, is then quoted.) In *Att.-Gen. v. Gower*, 1 Ves. Sen. 218, where tenants in common had contracted for the sale of their estate, and one of them died, it was held the survivors could not compel the purchasers to take their shares. But the converse of the proposition was denied, and it was held the purchasers might compel the survivors to convey their shares, although the contract could not be executed against the heirs of the deceased. The same doctrine was laid down in *Wood v. Griffith*, 1 Sw. 54; and in *Milligan v. Cook*, 16 Ves. 1, specific performance was decreed upon the bill of a purchaser, with a compensation for defect of title by a reduction of the purchase-money. In *Hill v. Buckley*, 17 Ves. 394, Sir WM. GRANT, M. R., stated the rule to be that, where a misrepresentation is made as to quantity, though innocently, the purchaser is entitled to have what the vendor can give, with an abatement out of the purchase-money for so much as the quantity falls short of the representation. The same rule of specific performance *pro tanto*, at the suit of the purchaser, with compensation for deficiency by abatement of the purchase-money, was acted upon in *Graham v. Oliver*, 3 Beav. 124; *Nelthorpe v. Holgate*, 1 Coll. 203. It was, also, asserted unanimously by the N. Y. Court of Errors, in *Waters v. Travers*, 9 Johns. 464. It is too strongly fortified, as well as founded in reason, to be successfully denied. Hence it has found its way into the best text-books as an established doctrine. Adams, in his *Treatise on Equity* (p. 90), lays it down that, in favor of the purchaser the rule in equity is, though he cannot have a partial interest forced upon him, yet if he entered into the contract in ignorance of the vendor's incapacity to give him the whole, and chooses afterwards to take as much as he can get, he has generally, though not universally, the right to insist on that, with compensation for the defect. He adds, the defect must be one admitting of compensation, and not a mere matter of arbitrary dam-

SEC. 440. The existence of easements upon the land in favor of third persons, or of other similar rights which conflict with those of the owner, and which would prevent a vendor from forcing an acceptance upon an unwilling vendee, will entitle the purchaser at his election to

ages. In Story's Equity, section 779, the general rule is also said to be that the purchaser, if he chooses, is entitled to have the contract specifically performed as far as the vendor can perform it, and to have an abatement out of the purchase-money, or compensation for any deficiency in the title, quantity, quality, description, or other matters touching the estate. \* \* \* There is nothing in this general rule of which a vendor can complain. It is his own fault, if he has assumed an obligation which he cannot fulfill. It cannot be inequitable to require him to perform, as far as it is in his power, and being in a court of equity, a decree that he make compensation for all that he fails to perform, is but completing what the court has begun, and preventing a multiplicity of suits. In no just sense can it be said that thus a new contract is made for the parties. The vendor is not compelled to convey anything which he did not agree to convey, and the vendee pays for what he gets according to the rate established by the agreement." In *Dale v. Lister*, cited 16 Ves. 7, the defendant had agreed to sell certain leasehold lands, to which he represented himself as absolutely entitled, and the suit was by the vendee for a specific performance. As to twenty-four acres, part of the land, the defendant was not absolutely entitled, but had only an interest in them for his own life, and consequently could not give a title to this part beyond his own life. The defendant admitted that the plaintiff might rescind the contract, but contended that he could not have a decree without paying the full price, as stipulated in the contract. The court, however, granted a specific performance, with an abatement from the purchase-price. Lord ELDON does not appear to have been entirely satisfied with this decision. See his remarks in *Milligan v. Cooke*, 16 Ves. 1, 7, 8. See, also, on the general doctrine, *Hanbury v. Litchfield*, 2 My. & K. 629; *Neale v. McKenzie*, 1 Keen, 474; *Graham v. Oliver*, 3 Beav. 124. The rule, as remarked in some of the foregoing citations, is not always enforced, for, under some circumstances, it would be inequitable. Thus, in *Wheatley v. Slade*, 4 Sim. 126, the vendor owning 9-16 of an estate, agreed by mistake to sell the whole; and Sir L. SHADWILL, V. C., held that he would not decree a specific performance as to the 9-16, with an abatement from the purchase-money, as a third person had a lien upon the land for a debt which would exhaust almost all the purchase-money; and see *Maw v. Topham*, 19 Beav. 576. If the contract contains an express stipulation that it is to be void in case of a partial failure of the title, or a deficiency in the subject-matter, or any other inability of the vendor to convey exactly what he promised, then, of course, the purchaser cannot compel a specific performance *pro tanto*, with an abatement from the price. *Williams v. Edwards*, 2 Sim. 78. In *Hooper v. Smart*, L. R. 18 Eq. 683, vendor agreed to convey certain land for 6,000*l.*, and to make a good marketable title to the whole. The completion being delayed, the vendee sued for a specific performance, when it was found that vendor owned only one-half of the land. *Held*, per HALL, V. C., that vendee was entitled to a decree for the half, with an abatement of one-half the price. In *Whittemore v. Whittemore*, L. R. 8 Eq. 603, the land sold was described as 753 square yards; it only contained 573 square yards. *Held*, per MALINS, V. C., that the vendee was entitled to an abatement from the price. The leading case, in respect to a deficiency in the quantity of land, is *Hill v. Buckley*, 17 Ves. 394, per Sir WM. GRANT.

insist upon a conveyance of the land subject to these rights, with such compensation or abatement from the price as shall be proportionate to the diminution in the value of the subject-matter. As for example, when the land is found to be subject to a right in a third person to dig for minerals or ores, the purchaser can demand a specific performance with compensation.(1) If the land is subject to an outstanding dower right of some widow, so that only two-thirds can be conveyed in possession, and the other one-third in reversion upon the death of the dowress, the equities of the parties have been adjusted in some of the decided cases, by a conveyance of the entire premises to the vendee, and by his present payment of two-thirds of the purchase-price, the other third remaining as a lien on the land, to be paid, without interest, at the widow's death, when her interest would cease, and the portion which had been held under it would come into the vendee's possession.(2) The case of an inchoate dower right resulting from the refusal of the vendor's wife to join with him in carrying his contract into execution by a conveyance, will be considered in a subsequent paragraph.

SEC. 441. When a person has contracted to grant a lease for a certain length of time, but is unable, on account of his own limited interest or lack of power, to give a lease for as long a period as he agreed, the intended lessee may, if he so elect, compel the lessor to execute the lease for the longest term which his estate or the power of leasing under which he acts, will permit, and will also be entitled to compensation for the loss which he sustains by the inability of the lessor to fully comply with the terms of his agreement.(3)

SEC. 442. The general doctrine stated in the preceding paragraph is subject, in all of its applications to particular cases, to the following most important limitation: If the vendee, at the time of enter-

(1) *Seaman v. Vawdrey*, 16 Ves. 390; *Peacock v. Penson*, 11 Beav. 355; *Painter v. Newby*, 11 Hare, 26. In *Downer v. Church*, 44 N. Y. 647, a person holding land by devise, "subject to the support and maintenance of" a third person, entered into a contract to sell it. Held, that his contract could be enforced, and he could be compelled to convey what title he had. As to enforcement of contracts to convey when the land is incumbered, see *Lesley v. Morris*, 9 Phila. 110.

(2) *Wingate v. Hamilton*, 7 Ind. 73; *Hazelrig v. Hutson*, 18 Ind. 481; *Springle v. Shields*, 17 Ala. 295; but see *Young v. Paul*, 2 Stockt. Ch. 402; *Troutman v. Gowing*, 16 Iowa, 415. In *Zebly v. Sears*, 38 Iowa, 507, it was held that the vendee, in such case, had an election to take a deed from the vendor alone, and sue for damages for the breach of the contract; or to take the deed and retain a proportionate part of the price; and see *Heimbürg v. Ismay*, 35 N. Y. Super. Ct. 35. This is not the rule in some states.

(3) *Leslie v. Crommelin*, 2 I. R. Eq. 134, 140.

ing into the contract, knows or is sufficiently informed that the vendor's title is defective, or that his interest is partial, or that the subject-matter is deficient, he is not entitled to any compensation; if he insists upon a conveyance of what the vendor can give, he must pay the full price stipulated; and the vendor may, perhaps, force a specific performance upon him without compensation.(1)

This limitation includes cases, not only where the vendor has received positive notice or information by direct communication, but also where the defects in the subject-matter were patent, plainly visible to every ordinary observer, and such that the vendee might have seen them in the exercise of his ordinary faculties of observation.(2) But, in order that the right of compensation may be thus cut off, the defect must be plainly visible to all persons, and must,

(1) *Peeler v. Levy*, 26 N. J. Eq. 330; *Franz v. Orton*, 75 Ill. 100. In such a case the vendee is regarded as agreeing to buy whatever interest the vendor has and is able to convey. His knowledge or notice of all the facts enters into the contract, and prevents him from asserting a right to an exact fulfillment of its terms, which he knew from the beginning to be impracticable. *Lawrenson v. Butler*, 1 Sch. & Lef. 13; *Mortlock v. Buller*, 10 Ves. 292; *Colyer v. Clay*, 7 Beav. 189; *Harnet v. Yielding*, 2 Sch. & Lef. 549. In *Castle v. Wilkinson*, L. R. 5 Ch. 534, a husband and wife agreed to sell the wife's estate in fee simple, the vendee knowing that it was the wife's property. She refused to convey; the vendee sued the husband, asking that he might be compelled to convey his life interest, and accept a reduced price. *Held*, that the vendee was not entitled to this relief. Lord Chancellor HATHERLY said: "On the face of the agreement the husband and wife intended to sell and the purchaser knew that he was contracting with them for the estate of the wife, and that he could only get what the wife was willing to convey; and there is no authority at all approaching to such a proposition as it has been necessary to contend for here, that the husband can be compelled to part with his partial interest in the estate, the agreement being by him and his wife to convey the whole. The latest authority, (*Barnes v. Wood*, L. R. 8 Eq. 424, before V. C. JAMES), is in strict conformity with the other authorities, \* \* \* namely, that when a man proposes to convey the whole of an estate, as owner of the fee simple, and it turns out that he is only entitled *pur autre vie*, and that his wife has the remainder, then the court can insist on his making good his contract to the extent to which he is able to make it good, and he must submit to an abatement of the consideration to be paid for that which he improperly alleged he was capable of selling. Since the case of *Emery v. Wase*, 5 Ves. 846, the whole matter has been settled; and as the purchaser has chosen to file his bill with a full knowledge of the law and the facts, his bill must be dismissed." This case is quite like that of *Barnes v. Wood*, *supra*, and fully stated in a former note, with the one controlling difference, that here the vendee *knew* that the land belonged to the wife, while in *Barnes v. Wood* he was ignorant of that fact, and supposed it belonged to the husband, with whom he contracted. On this difference in the fact turned the difference in the two decisions.

(2) *Dyer v. Hargrave*, 10 Ves. 505; *Oldfield v. Round*, 5 Ves. 508; *Pope v. Garland*, 4 Y. & C. Ex. 404.

therefore, exist in some manner or form in the corpus of the subject-matter—it would seem from the cases that the observer should be able to see and comprehend at sight the full extent and scope of the defect.(1)

SEC. 443. On the same principle it is well settled that if the purchaser, at the time of the contract, has constructive notice of the defect, or other facts which will prevent a compliance by the vendor with all the terms of the agreement, he loses all right to compensation; if he enters into the contract after such constructive notice, the effect upon his rights is the same as though he had received positive and direct information. While this rule is true, and recognized by all the authorities, there is, perhaps, some conflict of decision as to what constitutes such a notice.(2)

(1) *Grant v. Munt*, Cooper, 173, case where dry rot in a house was held not to be such a patent defect. *King v. Wilson*, 6 Beav. 124, a tenant in possession of a lot which he purchased, and which was represented to be forty-six feet deep in the contract of purchase, but which was only thirty-three feet deep; held not chargeable with knowledge of the true size. And see other cases, *ante*, § 223.

(2) In *James v. Lichfield*, L. R. 9 Eq. 51, land was contracted to be sold which the vendee knew to be in the occupation of a tenant, and afterwards discovered that the tenant had a lease for twenty-one years. Vendee sues for a specific performance with compensation. *Held*, that he had constructive notice of the lease, and was not entitled to any compensation—*i. e.*, any abatement from the price. Lord ROMILLY, M. R., said: “If the purchaser, knowing of the tenancy, is bound to inquire as regards the tenant as to his interest in the land, and if the purchaser must be taken to be bound to know what would be the result of such inquiry as regards the tenant, why should he not be bound as regards the vendor? And if the purchaser chooses to bind himself by agreement with this vendor, knowing of the tenancy, but without having accurately ascertained what was the extent and character of it, and what the results of such inquiry would have led to, he must, as it appears to me, be bound in the same manner as regards all other persons. I think, also, that no distinction can properly be drawn in a court of equity on the ground that the matter rests in contract, and that the conveyance of the legal estate has not been made to him. The purchaser bound himself by the contract. He must be taken to have had present to his mind all those things of which he had notice, and those things which necessarily flowed from, and even incidental to, that notice. He knew that Allen was tenant of this land; he was bound to inquire what the tenancy was, unless he was willing to be bound by the tenancy whatever it was. The bill must be dismissed, with costs, unless the plaintiff elects to take the property without compensation.” See, also, *In re Ryan's Estate*, 3 I. R. Eq. 255. See, also, the somewhat similar case of *Franz v. Orton*, 75 Ill. 100, in which the actual occupation of the land by tenants of a third person, was held to be constructive notice to the vendee. The decision of Lord ROMILLY, in the case of *James v. Lichfield*, can hardly be reconciled with a more recent decision of Sir J. JESSEL, M. R., and the court of appeal, in *Caballero v. Henty*, L. R. 9 Ch. 447, upon a state of facts altogether similar. A public house was sold, and the conditions of sale stated that it was “in the occupation of a tenant.” The

SEC. 444. The purchaser may also cut off his right to any compensation for a defect in title, or in the subject-matter, by his unreasonably negligent conduct, or omission to use ordinary prudence in making the purchase. Thus, where the defect would have been easily discovered if the purchaser had used the care and forethought of an ordinarily prudent man, and by simply making reasonable and proper inquiries about the state and condition of the property, and he neglects to use such care, and omits to make any inquiries, he thereby precludes himself from the right to claim compensation, for equity will not aid persons who have been unreasonably careless. A man cannot rush headlong, and with his eyes shut into a bargain, and then require the court to relieve him from the consequences of his own foolishness.(1) And the court will not always allow a purchaser

vendee, a brewer, bought it intending to use it for the sale of his beer. He found that it was under a lease to another brewer for a term of which eight years remained. The vendor, suing, held by the M. R. and on appeal, that the vendee was not bound to ascertain from the tenant the terms of his tenancy—that is, that the language of the condition was not a constructive notice, and that vendor was not entitled to enforce a specific performance without making compensation. *James v. Lichfield* was relied upon by the plaintiff as decisive; but the court must, I think, be considered as virtually overruling that case, for they denied, *in toto*, the correctness of the reasoning upon which Lord ROMILLY had rested his decision. He said that as the purchaser was bound to know, as between himself and the tenant, the terms of the tenancy, so he was bound to know them as between himself and the vendor. This the court denied, and said that this doctrine, which is laid down in *Daniels v. Davison*, 16 Ves. 2:9, does not apply as between the vendor and vendee, while the matter still rests in contract, and that it refers only to the equities between the vendee and the tenant *after the legal estate has passed to the vendee*. So, although the court did not, in express terms, overrule *James v. Lichfield*, they overturned the entire basis of legal doctrine upon which its decision was based, and in my opinion destroyed its authority on the point that a vendee, knowing that the land is in possession of a tenant, has thereby a constructive notice of the nature and length of the tenancy, and is bound to complete without compensation. See, also, *Hughes v. Jones*, 3 DeG. F. & J. 307.

(1) *Edwards-Wood v. Marjoribanks*, 1 Giff. 384; 3 DeG. & J. 329; 7 H. L. Cas. 806. In this case an agreement was made for the sale of an advowson, the vendee voluntarily offering 2,800*l.*, which was accepted. The contract said nothing as to the income of the living, *nor was any question asked by the purchaser*, nor any representation made by the vendors on that subject during the negotiation. The title was perfect and accepted, but before completion the purchaser found that the income of the living was charged with the repayment of a sum of money borrowed from Queen Ann's bounty for rebuilding the parsonage, of which the vendors were aware. The vendee demanded an abatement of the price, and on this being refused, he sued for a specific performance with compensation. Held by the V. C. STUART, and on appeal, and by the House of Lords, that he was not entitled to any compensation. Lord J. KNIGHT-BRUCE, after describing in very plain terms, the position taken by the plaintiff, says (page 332): "At the time neither



compensation when there is a deficiency in the quantity of the land contracted to be sold, even when the terms of the agreement are not such that he expressly takes the risk of the quantity by buying with a description by metes and bounds, or otherwise. In general, the purchaser is entitled to compensation for a deficiency, except where the language of the agreement cuts off his claim; but this rule is sometimes, from the circumstances of the case, departed from, and the vendee left to the alternative of abandoning the contract entirely, or of having a specific performance without any abatement from the price.(1)

of the treaty nor of the contract, is the income of the benefice mentioned. The purchaser offers a certain sum, not informing the vendors on what basis of calculation the offer is founded. The vendors accept the offer, and in my view they were not guilty of the least impropriety of conduct, or of the least breach of duty in doing so without mentioning the charge, assuming them all to have been aware of its existence. Had they been asked a question, or if they had any reason to believe the purchaser misled, or ignorant of the circumstances of the property, they might have been bound to make compensation. But not one of these circumstances exists here. For aught that appears, each vendor had reason to believe that the purchaser knew every circumstance connected with the property. If he did not, why did he not make inquiry? He might have applied to the incumbent, to the parish clerk, to the church wardens, to any one acquainted with the parish business. He might have gone to the office of Queen Ann's bounty. To that office he does go, apparently of his own accord, after entering into the contract. Why did he not go before, if the matter was of interest to him? Though he had been a man of business, he shuts his eyes against what he might have ascertained by opening them. This was not a concealed incumbrance, not a latent vice, but a charge to which he must have known that by the general law, every living is liable, and to which he might have ascertained by the easiest inquiry, that this living was subject." Lord J. TURNER, after agreeing with these views, added a *quære*, whether the doctrine of compensation ever applies in cases where, if the purchaser does not resell, he can sustain no loss from the defect in the title or subject-matter? In other words, where the defect can produce loss to the purchaser only in case he resells the property, *quære*, whether compensation can ever be given?

(1) *Earl of Durham v. Legard*, 34 L. J. (N. S.) Ch. 589. The vendor agreed to sell an estate which both parties supposed, and which was stated in the contract to contain 21,750 acres, but which in fact contained 11,814 acres. The vendee sued for a specific performance with compensation, but *held* that he was not entitled to that relief under the circumstances of the case; but, of course, that he might abandon the contract. Sir J. ROMILLY, M. R., said: "In the case of *Hill v. Backley*, 17 Ves. 394, which is usually cited upon these occasions, Sir WM. GRANT laid it down that where there is less land than was agreed to be sold, the ordinary mode of settling it is to ascertain the quantity and take it ratably. If that were done here, the plaintiff would get an estate which he had intended to buy for 66,000*l.* for about 33,000*l.* If this principle were to be followed in the present case, \* \* it is clear I should be doing great injustice. I am of opinion that this is a case simply of mistake, and that the purchaser is not entitled to any compensation." He was allowed to elect whether to perform the contract without abatement, or to abandon his suit entirely.

SEC. 445. The right to any compensation may, of course, be waived or renounced by express stipulation contained in the contract of sale. Several different forms of these provisions seem to have become quite common in England, and have received a judicial construction. They are sometimes confined to errors in the quantity or description of the land, and are sometimes extended to defects or partial failures in the title, incumbrances, and the like. Where such a stipulation is plain and express in its language, and there has been no intentional misdescription, or other fraudulent conduct of the vendor, full effect will be given to it by the court, *as to all matters which, it is reasonable to suppose, were intended to be embraced within its restrictive terms.*(1) But such a stipulation, cutting off compensation for errors in description or defects in the quantity of the subject-matter, will be construed as intended to apply only to comparatively small errors and defects, and for really substantial errors or defects the purchaser is still entitled to compensation according to the general doctrines on the subject adopted by the court.(2)

SEC. 446. Another form of stipulation, which is not uncommon in England, is substantially the following, that the vendor may rescind the contract if the vendee makes and persists in any objection to the title, or if the vendee makes any requisition in respect of the title with which the vendor is "*unable or unwilling*" to comply; or, in other words, if the vendor is unable or even unwilling to go on and take the necessary steps to show a good title. The courts will, under ordinary circumstances, give effect to such a stipulation by allowing the vendor to rescind, where the position of the parties which it contemplates and provides for, has been actually reached. He may even rescind, although he might be able to make out and show a perfect title, since one object of the stipulation is to relieve him from the expense, labor, and difficulty which might be required on his part in

(1) *Cordingley v. Cheeseborough*, 3 Giff. 496; 31 L. J. (Ch.) 617. The stipulation was that "the admeasurements are presumed to be correct, but if any error be discovered therein, no allowance shall be made or required either way." The vendee sued for a specific performance with compensation on account of an error, and specific performance was decreed without compensation, and the plaintiff was compelled to pay the costs. See, also, *Nicoll v. Chambers*, 11 C. B. 996.

(2) Thus, in *Whittemore v. Whittemore*, L. R. 8 Eq. 603, the contract contained a provision that "if any error, misstatement or omission in the description of the premises should be discovered, it should not annul the sale nor should any compensation be allowed by the vendor or purchaser therefor." The land was stated to contain and sold as containing 753 square yards, but only contained 573 square yards. Held, by MALINS, V. C., that the provision only applied to small errors, and the vendee was entitled to compensation.

order to perfect his title to the satisfaction of the purchaser.(1) The vendor, if he elects to take advantage of the provision, must give timely notice of his rescission. The vendor may, by his own conduct either before or after making the contract, either destroy or waive all right to avail himself of the stipulation and to rescind the contract, and it would seem that the court will scrutinize his acts and omissions very strictly in this respect.(2)

(1) *Duddell v. Simpson*, L. R. 2 Ch. 102; reversing S. C., L. R. 1 Eq. 578; *Mawson v. Fletcher*, L. R. 6 Ch. 91; L. R. 10 Eq. 213; *Greaves v. Wilson*, 25 Beav. 290; *Page v. Adam*, 4 Beav. 269; *Nelthorpe v. Holgate*, 1 Coll. 203; *Painter v. Newby*, 11 Hare, 26; *Turpin v. Chambers*, 29 Beav. 104; *Hoy v. Smythies*, 22 Beav. 510; *Williams v. Edwards*, 2 Sim. 78. In *Duddell v. Simpson*, L. R. 1 Eq. 578, the stipulation authorized the vendor to rescind in case the vendee should insist on any requisition as to title with which the vendor should be unable or unwilling to comply. Vendee made a requisition with which the vendor was unable or unwilling to comply, and vendor gave notice of rescission. The vendee then wholly waived his requisition. Held, that vendor was not justified in rescinding when the vendee, after learning that the vendor was unable or unwilling to comply, waived the requisition, and a specific performance was decreed. But this decision was reversed by the court of appeal, L. R. 2 Ch. 102, which held that the vendor had a right to rescind, giving effect to the word "unwilling" which the court below had overlooked or treated as of no consequence. In *Mawson v. Fletcher*, *supra*, the stipulation was that if any objection to the title was persisted in the vendor might rescind. The vendee made an objection and persisted in it. Vendor gave notice of rescission. Vendee sued for a specific performance with compensation. Vendor answered that he had a good title, but that he had rescinded. Held, that vendor might rescind although he could make a good title, since the removal of the objection, and showing a perfect title would require a long and expensive inquiry, from which the stipulation gave him the right to escape if he so elected; and a specific performance with compensation was refused.

(2) It has been held that the vendor acquires no right under such a provision to rescind the contract, in the following cases: Where, at the time of making the contract of sale, he knew that his title to the subject-matter, or to a part of it, was defective; for such a contract would be so unfair and one-sided as to be virtually fraudulent. *Nelthorpe v. Holgate*, 1 Coll. 203; but see *Thomas v. Dering*, 1 Keen, 729; and, *a fortiori*, where he had knowingly and intentionally made misrepresentations concerning the subject-matter. *Price v. Macaulay*, 2 De G. M. & G. 347; and where the vendee is willing to waive all objections to the title, and to accept a conveyance without any deduction from the price. *Page v. Adam*, 4 Beav. 269; *Williams v. Edwards*, 2 Sim. 78. But it would seem, from the case of *Duddell v. Simpson*, *supra*, that the vendee must signify his intention of waiving objections and taking the title as it is, before he has presented any objection, and the vendor has thereupon given notice of rescission; if the vendee has objected and the vendor has replied thereto by a notice of rescission, it does not seem just that the vendee should *then* be able to waive his own objection and enforce a specific performance; at all events, where the stipulation enables the vendor to rescind if he is "unwilling" to make a good title. It has also been held that the vendor *waives* his right to rescind in the following cases: Where, instead of giving notice of rescission, he replies to the vendee's objections and

SEC. 447. A partial specific performance at the suit of the vendee may be refused on the ground that an enforcement of the contract would be injurious to persons having interests in the land, such as estates therein subsequent to that of the vendor, but who are neither parties to the agreement nor to the suit.(1) If the purchaser has been guilty of misrepresentations in procuring the contract to be made, the court will not grant him a partial specific performance, even if he is willing to accept a conveyance of the subject-matter subject to its defects of title, or to outstanding interests in it which may exist in favor of third persons, and to waive all claim to compensation.(2) And on the same principle, if the vendee, when entering into the contract, has suppressed or concealed any material fact concerning or connected with the subject-matter, which was within his own knowledge, and which ought in good faith to have been communicated to the vendor, he will not be entitled to a specific performance, either partial or entire.(3)

requisitions, and thus shows an intention of going on with the negotiation, and not of bringing it to a sudden end. *Tanner v. Smith*, 10 Sim. 410; *McCulloch v. Gregory*, 1 K. & J. 294; unless his replies are expressly to be without prejudice to his right, *Morley v. Cook*, 2 Hare, 111; and generally where his conduct is confirmatory of the contract, or inconsistent with any other position than that of acquiescing in it. *Cole v. Gibbons*, 3 P. Wms. 290; *Atwood v. Small*, 6 Cl. & Fin. 424, 432; *Flint v. Woodin*, 9 Hare, 618.

(1) *Thomas v. Dering*, 1 Keen, 729; *Graham v. Oliver*, 3 Beav. 124; *Beeston v. Stutely*, 27 L. J. Ch. 156; 6 W. R. 206.

(2) *Clermont v. Tasbury*, 1 J. & W. 112.

(3) The recent case of *Phillips v. Homfray*, L. R. 6 Ch. 770, illustrates this principle in a very emphatic manner, since no pecuniary loss could have resulted from the concealment. The plaintiff, owner of a colliery, contracted to purchase an adjoining tract of land which also contained coal. The vendee had already, without the vendor's knowledge and without authority, taken a considerable quantity of coal from the vendor's land, of course at points below the surface, and this fact was not disclosed by the vendee. There was not, however, any undervaluation of the land sold in the contract; that is, the vendee agreed to pay a sum which would have been a fair price for the land had all the coal remained untouched, so that in reality the purchaser agreed to pay for the coal which he had already taken. Nevertheless, on a suit by the vendee for a specific performance, the court of appeal (Lord Ch. HATHERLY affirming the decision of V. C. STUART), held that the contract could not be enforced. Lord HATHERLY said: "If a man knows that he has committed trespass of a very serious character upon his neighbor's property, and finding it convenient to screen himself from the consequences, makes a proposal for the purchase of that property, he certainly ought to communicate to the person with whom he is dealing, the exact state of the circumstances of the case, and to say to him: 'I regret that from mistake,—(if it be mistake, and I will assume it to be so for the present purpose)—I have taken some two thousand tons of your coal. I do not know what your

SEC. 448. When the nature of the subject-matter, the terms of the contract, or the kind and extent of the defect are such that they furnish no basis upon which to ascertain the amount of the compensation with any reasonable degree of certainty, and the fixing the amount would, therefore, be a mere matter of speculation, a partial specific performance with compensation must be refused, even when demanded by the purchaser. The court will not apply this rule except in cases of real necessity, and prefers to grant compensation even when its measure cannot be exact, and the estimate must be rather approximate than certain.<sup>(1)</sup> Indemnity has sometimes been given by courts of equity, instead of compensation, when the loss is contingent; but

view of the case may be. I am ready to buy the property out and out, or I am ready to submit to the consequences of an action or an arbitration, or what you like, with reference to this coal I have taken.' The proposal which he makes is not in reality a simple proposal for the purchase of the property; it involves a buying up of rights which the owner has acquired against him, and of which the owner is not aware. He is, therefore, bound to inform the owner of the circumstances of the case, and is not at liberty to enter into a contract without his disclosing his commission of an act which has rendered him liable to certain consequences, and of which act the person with whom he is dealing has a right to be informed, in order to know what course he is to adopt. \* \* \* I apprehend it would be an error to say, generally, that you cannot enforce a contract in this court where the one party knows more of the value than the other does. It happens frequently in the purchase of pictures—for instance, that one party knows a great deal more of the value than the other, and yet the bargain is perfectly good. \* \* \* But the case is, not merely that the purchasers, being more experienced men, knew the value of the coal better than the vendors, but that the vendors being unable to gain access to the coal, the purchasers took advantage of an unlawful access to it in order to test its value, and did not communicate to the vendors the result. \* \* \* The case would, I think, be something analogous to this: Suppose a picture-dealer, employed to clean a picture, scrapes off a part of the picture to see if he can discover a mark which will tell him who is the artist, and thus finds a mark showing it to be the work of a great artist, that would not be a legitimate mode of acquiring knowledge for the purpose of enabling him to buy the picture at a lower price than the owner would have sold it for had he known it to be the work of that artist. I do not, however, dwell on that point, as it is not satisfactorily established in my mind that the price was inadequate. The ground of my decision is, that the purchasers suppressed the fact of their having wrongfully got a large quantity of the vendor's coal, and so given the vendor a heavy pecuniary claim against them."

(1) For example, compensation has been given for a right to dig coal in the land sold. *Ramsden v. Hirst*, 4 Jur. (N. S.) 200. Still, if no reasonable estimate can be made, compensation must be refused; as when ornamental timber was cut on property which the vendee intended for a residence, it was held that the value of the timber as ornamental, and the amount of the loss, could not be measured. *Magennis v. Fallon*, 2 Moll. 561, 584; see, also, *Lord Brooke v. Rounthwaite*, 5 Hare, 298.

the court will not compel the vendee to take, nor the vendor to give, an indemnity unless it is provided for by the terms of the contract itself.(1).

SEC. 449. II. *Where the vendor is the actor, demanding a partial specific performance, or a specific performance with compensation.*—Before proceeding with the discussion of this topic, I would point out an exceedingly important distinction between two classes of cases in which the vendor is the plaintiff or moving party—a most important difference between the relations in which the litigants stand to each other—which must ever be kept in view when examining the decisions, and applying them to the facts of any particular case; in other words, the force and effect of the authorities cannot be correctly appreciated without a constant recognition of this distinction; and yet it has been passed over in silence by the text-writers. It is the following: In one class of cases the vendor, knowing that he cannot fulfill in all respects, and that he is not entitled to a complete specific performance, alleges all the facts showing why he is unable to comply with the exact terms of the contract, and prays for a decree compelling the defendant to accept the partial performance, and conceding that compensation or abatement from the price should be allowed; in other words, the vendor seeks to force a specific performance with compensation upon an unwilling purchaser. The defendant, on the other hand, resists the plaintiff's claim entirely, and denies his liability to accept a conveyance and perform on his own part, even if he does receive compensation.(2) In the other class of cases, the vendor alleges what he regards as the material facts, and demands a decree compelling the defendant to accept the title and subject-matter in their actual condition without any compensation; or, in other words, the vendor asserts the purchaser's full liability to specifically perform,

(1) See the following cases, in which the subject of indemnity is discussed: *Milligan v. Cooke*, 16 Ves. 1; *Campbell v. Hay*, 2 Moll. 102; *Balmanno v. Lumley*, 1 V. & B. 225; *Paton v. Brebner*, 1 Bligh, 66; *Aylett v. Ashton*, 1 My. & Cr. 105; *Powell v. South Wales Ry. Co.*, 1 Jur. (N. S.) 773; *Bainbridge v. Kinnauld*, 32 Beav. 346; *Ridgway v. Gray*, 1 Hall & T. 195; 1 Mac. & G. 109; *Wood v. Bernal*, 19 Ves. 220; *Fildes v. Hooker*, 3 Mad. 193; *Wilson v. Williams*, 3 Jur. (N. S.) 810; *Lounsbury v. Locander*, 25 N. J. Eq. 555.

(2) For example, if the vendor discovered that he could not make title to a portion of the land, and should, nevertheless, attempt to compel the purchaser to accept the part of which the title was good, with a corresponding abatement from the price, and the vendee should resist the claim, and deny his liability to accept a partial performance even with compensation, the case would be an example of this class

and denies expressly or tacitly his own liability to make compensation; he asks the ordinary decree without compensation. The vendee, on the other hand, does not wholly refuse to complete, as in the former case; on the contrary, is willing to complete upon being allowed compensation. He, therefore, sets up the facts showing a partial failure, etc., and insists that he is not obliged to specifically perform without an abatement from the price.(1) It is plain that the plaintiff must be held by much more strict rules in granting him relief in the first class of cases than in the second; in fact, the relations of the parties, in the second class of cases, are quite similar to those which exist when the vendee himself is the plaintiff. The doctrines and rules which I shall first state and illustrate are those which govern the decision of cases belonging to the former of these two classes.

SEC. 450. While, as has been shown in the preceding subdivision, the vendee may in general compel the vendor to convey what he has, and to make compensation for his failure to fully comply with his agreement, the vendor cannot, in general, compel the vendee to accept a partial specific performance of the agreement with compensation for the defects of title or deficiency of subject-matter. In respect of the right to enforce a partial performance upon his adversary, the vendor does not possess the power of election which equity confers upon the vendee. Two rules are equally well settled by courts of equity. If the vendor's failure to comply with the terms of the contract, either with respect to a defective title or a deficiency in the subject-matter, is not material, but is rather formal in its nature, so that the purchaser will get *substantially* what he contracted for, then the vendor can obtain a decree for a specific performance with compensation, even against an unwilling vendee.(2) If, however, the inability of

(1) If the vendor brings a suit in the ordinary form, seeking to obtain the ordinary decree, and the purchaser should set up some particular point in which the premises failed to correspond with the description, some deficiency in the subject-matter, or perhaps some incumbrance or easement, and should allege a willingness to complete on being allowed a suitable compensation, but deny a liability to complete without a compensation, the case would belong to the second class, and it is plain that the decision would be governed by an application of the same principles which have been stated in the last preceding subdivision—the principles which control in suits brought by vendees asking for a specific performance with compensation.

(2) *Halsey v. Grant*, 13 Ves. 77, per Lord Ch. ERSKINE; *Guest v. Homfray*, 5 Ves. 818; *Mortlock v. Buller*, 10 Ves. 306; *Vignolles v. Bowen*, 12 Ir. Eq. Rep. 194; *McQueen v. Farquhar*, 11 Ves. 467; *Scott v. Hanson*, 1 Russ. & My. 128; *King v. Wilson*, 6 Beav. 124; *Cann v. Cann*, 3 Sim. 447; *Foley v. Crow*, 37 Md. 51. This doctrine is well laid down in this last case, as follows: "Where a vendor

the vendor to fulfill on his part affects a material part of the contract, if the defect in his title or the deficiency in the subject-matter is substantial, and not merely a failure to literally comply with the exact terms of the agreement—in short, if the vendee will not get substantially what he contracted for, then the vendor will not be permitted to enforce such a partial performance, even with compensation upon an unwilling purchaser.(1)

SEC. 451. The doctrine that the vendor cannot force a partial specific performance with a compensation, applies where there has been a material misdescription in the contract, even though not intentional—that is, where the title, kind of estate, or the subject-matter which the vendor actually has differs in any material manner from that described; and this may be so even when the contract contains a clause expressly providing for compensation in case of any error.(2) The following are illustrations of this rule, and of the cases in which it has been enforced: A vendor who has contracted to give or to assign a lease, cannot compel the purchaser to accept a transfer of an

is unable from any cause, not involving *mala fides* on his part, to convey each and every parcel of the land contracted to be sold, and it is apparent that the part which cannot be conveyed is of small importance, or is immaterial to the purchaser's enjoyment of that which may be conveyed to him; in such case the vendor may insist on performance with compensation to the purchaser, or a proportionate abatement from the agreed price, if that has not been paid." If this language be extended so as to include also immaterial defects of title, it will be a very correct and comprehensive statement of the doctrine. *Shaw v. Vincent*, 64 N. C. 690; *Nagle v. Newton*, 22 Gratt. 814; *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477.

(1) *Long v. Fletcher*, 2 Eq. Cas. Abr. 5, pl. 4; *Spinner v. Walsh*, 11 Ir. Eq. 597; *Drewe v. Hanson*, 6 Ves. 675; *Halsey v. Grant*, 13 Ves. 73; *Stapylton v. Scott*, 13 Ves. 425; *Knatchbull v. Grueber*, 3 Meriv. 124, 146; *Howland v. Norris*, 1 Cox, 59; *Peers v. Lambert*, 7 Beav. 546; *Perkins v. Ede*, 16 Beav. 193; *Osbaldiston v. Askew*, 2 J. & W. 539; *Sullings v. Sullings*, 9 Allen, 234; *King v. Knapp*, 59 N. Y. 462; *Thorp v. Pettit*, 1 C. E. Green, 488; *Earl v. Halsey*, 1 McCarter, 332; *Hoover v. Calhoun*, 16 Gratt. 109; *McKean v. Read*, 6 Litt. 395; *Jackson v. Ligon*, 3 Leigh, 161; *Breckenridge v. Clinckinbeard*, 2 Litt. 127; *Bryan v. Read*, 1 Dev. & Bat. Eq. 78; *Reed v. Noe*, 9 Yerg. 283; *Cunningham v. Sharp*, 11 Humph. 116, 121; *Buchanan v. Atwell*, 8 Humph. 516; *McCulloch v. Dawson*, 1 Ind. 413; *O'Kane v. Kiser*, 25 Ind. 168; *Hepburn v. Auld*, 5 Cranch, 262. *Shaw v. Vincent*, 64 N. C. 690; *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477.

(2) In *Flight v. Booth*, 1 Bing. (N. C.) 377, C. J. TINDAL used the following language concerning the misdescription which would thus override a clause expressly providing for compensation: A misdescription "in a material and substantial point, so far affecting the subject-matter of the contract as that it may be reasonably supposed that, but for such misdescription, the purchaser might never have entered into the contract at all."



underlease.(1) And a vendor cannot force the purchaser to accept a different species of estate from that agreed to be conveyed, as leasehold instead of freehold, even though the lease is for a very long term; it is in fact a general principle that a defect which extends to and affects the entire estate prevents a specific performance against an unwilling vendee.(2) But any objections which the vendee might otherwise thus make to the different kind or nature of the estate, will be waived by his conduct inconsistent with an intention to abandon the contract; as by his going on with the negotiation and dealing after he discovers the true nature of the vendor's interest.(3)

SEC. 452. A vendor who has contracted to sell an entire estate or parcel of land, cannot compel the purchaser to accept the conveyance of an undivided share of it with compensation; (4) nor can the vendor of an estate in possession force upon the unwilling vendee an estate in remainder or reversion.(5) If the land contracted to be sold turns out to be subject to charges, easements, rights of user or incumbrances, which extend to the whole estate, and cannot be compensated for, and removed by an application of the purchase-money, the vendor is not entitled to enforce the contract; but if the charge is a slight and immaterial one, and especially if it be an incumbrance by mortgage or judgment, which can be paid off and removed by means of the purchase-money, the court may decree a specific performance making provision in the decree for removing the incumbrance.(6)

(1) *Madeley v. Booth*, 2 DeG. & Sm. 718; but see *Darlington v. Hamilton, Kay*, 558, a case in which, from its peculiar facts, the rule was not applied.

(2) Leasehold instead of freehold, *Drewe v. Corp*, 9 Ves. 368; 1 S. & S. 201, n; *Wright v. Howard*, 1 S. & S. 190; *Barton v. Lord Downes*, 1 Flan. & K. 505; *Fordyce v. Ford*, 4 Bro. C. C. 494. A vendee is not compelled to take copyhold when he has contracted for freehold. *Twining v. Morrice*, 2 Bro. C. C. 26; *Hicks v. Phillips*, Prec. Ch. 575; but see *Price v. Macaulay*, 2 DeG. M. & G. 339; nor will a vendee who has contracted to purchase copyhold be forced to accept an estate partly freehold. *Ayles v. Cox*, 16 Beav. 23; and see *Daniels v. Davison*, 16 Ves. 249; and *Prindergast v. Eyre*, 2 Hogan, 81.

(3) *Fordyce v. Ford*, 4 Bro. C. C. 494; *Burnell v. Brown*, 1 J. & W. 168; *Martin v. Cotter*, 3 Jo. & Lat. 496; but he will still be entitled to compensation if he object. *Calcraft v. Roebuck*, 1 Ves. 226.

(4) *Att'y-Gen. v. Day*, 1 Ves Sen. 218; *Roffey v. Shallcross*, 4 Madd. 227; *Dalby v. Pullen*, 3 Sim. 29; *Casamajor v. Strode*, 2 My. & K. 723; *Erwin v. Meyers*, 10 Wright, 96; *Napier v. Darlington*, 20 P. F. Smith, 64; *Clark v. Reins*, 12 Gratt. 98.

(5) *Collier v. Jenkins*, You. 295; *Nelthorpe v. Holgate*, 1 Coll. 203; *Hughes v. Jones*, 3 DeG. F. & J. 307.

(6) As to mortgages, etc., which can be removed, *Guynet v. Mantel*, 4 Duer, 86; *Marsh v. Wyckoff*, 10 Bosw. 202; *Thompson v. Carpenter*, 4 Barr. 132;

SEC. 453. A failure of the vendor's title to a part of the land contracted to be sold, may or may not defeat his right to a specific performance. If the portion to which the title fails is small, unnecessary and immaterial to the possession and reasonable enjoyment of the rest, and is susceptible of compensation, the vendee will be compelled to accept that which can be conveyed with a proportionate abatement from the price.(1) But if such part would be material to the possession and enjoyment of the rest, then the vendor cannot force an acceptance of the residue upon an unwilling vendee.(2) In

*Tiernan v. Roland*, 3 Harris, 429; *Wallace v. McLaughlin*, 57 Ill. 53; but if the incumbrance cannot be removed because it is more than the purchase-price, or for any other reason, the vendee will not be compelled to accept the land. *Hinckley v. Smith*, 51 N. Y. 21; *Christian v. Cabell*, 22 Gratt. 82; *Gurnel v. Mason*, 4. Call. 369; *Snyder v. Spaulding*, 57 Ill. 480; *Wallace v. McLaughlin*, 57 Ill. 53. For small and trifling incumbrances compensation may be given, and a specific performance granted. *Horniblow v. Shirley*, 13 Ves. 81; *Halsey v. Grant*, 13 Ves. 73; *Esdale v. Stephenson*, 1 S. & S. 122; *Bowles v. Waller*, 1 Hayes, 441; *Prendergast v. Eyre*, 2 Hogan, 94; *Portman v. Mill*, 1 Russ. & My. 696; *Howland v. Norris*, 1 Cox, 59; *Winne v. Reynolds*, 6 Paige, 407; *Ten Broeck v. Livingston*, 1 Johns. Ch. 357. In the following cases it has been held that the existing charge on the land was fatal to a decree in favor of the vendor with compensation; a right of sporting over the land: *Burnell v. Brown*, 1 J. & W. 168, although the objection would be waived if the vendee took possession after notice of the right—a right of digging on or over the land for mines or minerals, *Barton v. Lord Downes*, 1 Flan. & Kel. 505; *Seaman v. Vawdrey*, 16 Ves. 390; *Upperton v. Nickolson*, L. R. 6 Ch. 436; a liability to keep a chancel in repair, *Horniblow v. Shirley*, 13 Ves. 81; 2 Sw. 223; certain species of taxes which were permanent liens, *Cox v. Coventon*, 31 Beav. 378; *Barraud v. Archer*, 2 Sim. 433; 2 Russ. & My. 751; a liability for tithes, *Binks v. Lord Rokeby*, 2 Sw. 222; but see *Smith v. Tolcher*, 4 Russ. 302; a right of way over land sold and bought for purpose of erecting buildings on it, *Dykes v. Blake*, 4 Bing. (N. C.) 463; an easement of water with right to take water from springs, enter and clean out channels, etc., *Shackleton v. Sutcliffe*, 1 DeG. & Sm. 609.

(1) *McQueen v. Farquhar*, 11 Ves. 467; *Knatchbull v. Grueber*, 1 Madd. 153; *Bowyer v. Bright*, 13 Price, 698; *Carver v. Richards*, 6 Jur. (N. S.) 667; *Scott v. Hanson*, 1 Russ. & My. 128; *Richardson v. Smith*, L. R. 5 Ch. 648; *Shaw v. Vincent*, 64 N. C. 690; *Davison v. Perrine*, 7 C. E. Green, 87; *Foley v. Crow*, 37 Md. 51.

(2) *Peers v. Lambert*, 7 Beav. 546; *Perkins v. Ede*, 16 Beav. 193; *Osbaldeston v. Askew*, 2 J. & W. 539, per Lord Eldon; *Knatchbull v. Grueber*, 1 Madd. 153; *Stewart v. Alliston*, 1 Meriv. 26; *Caballero v. Henty*, L. R. 9 Ch. 447; *Shackleton v. Sutcliffe*, 1 DeG. & Sm. 609; *Stewart v. Marquis of Conyngham*, 1 Ir. Ch. Rep. 534; *Hughes v. Jones*, 3 DeG. F. & J. 307; *Leyland v. Illingworth*, 2 DeG. F. & J. 248; *Magenis v. Fallon*, 2 Moll. 590; *Darby v. Whitaker*, 4 Drew, 134; *Jackson v. Jackson*, 1 Sm. & G. 184. See *Denny v. Hancock*, L. R. 6 Ch. 1, and *Baskcomb v. Beckwith*, L. R. 8 Eq. 100. A clause is sometimes inserted in the contract by which the vendee stipulates not to demand title or object to the title beyond or prior to a certain person or a certain conveyance which is

immediate connection with this case stands that of the sale of several distinct lots or parcels and a failure of title to part of them. One principle at bottom governs the two cases, but the latter one also involves the doctrine of the entirety or separability of contracts. Two rules are, therefore, established by the decisions. If two or more lots, although physically distinct and having no necessary connection, are sold by one entire contract and for one gross sum, and the title to one or more of them fails, the court will not undertake to apportion the price among the parcels and make abatement in respect of those lots which cannot be conveyed, and a specific performance will be wholly refused.(1) But if the lots are sold by the same vendor to the same purchaser by one and the same contract which is separable and not entire, then there being a distinct and separate contract with respect to each lot, a failure of title to one or more of the lots will not prevent the vendor from obtaining a decree of specific performance as to the others; and it is also settled as a part of this doctrine, that if the lots, though sold at one time and by the same agreement, are yet sold for distinct and separate prices—a separate price named for each lot—then the contract is at least *prima facie* separable and not entire, and the rule as above stated applies.(2)

SEC. 454. How far a mere deficiency in the quantity of the land shall defeat the vendor's remedy, or compel him to make compensation, or not effect his remedial right at all, must depend upon the particular form and terms of the contract in reference to this point, and upon the presence or absence of any misstatement or misleading conduct by the seller. If the land is sold, not by the number of acres, but by metes and bounds, or by means of any other similar description which identifies the particular tract, and the vendee receives a

assumed as the starting point—the person designated being taken to be at one time the true and lawful owner. The effect of this clause has been frequently considered. It is held that where the clause is misleading, and both parties have been mistaken, and the assumed source of title is in fact erroneous, so that the vendor's title is radically defective, the clause has no effect whatever, and does not prevent the vendee from going behind or beyond the point thus taken as the source. *Jones v. Clifford*, L. R. 3 Ch. D. 779; *Harnett v. Baker*, L. R. 20 Eq. 50; *Else v. Else*, L. R. 13 Eq. 196. But where there is no such common mistake affecting the whole title, the clause has its full effect. *Hume v. Pocock*, L. R. 1 Ch. 379; 1 Eq. 423; *Micholls v. Corbett*, 3 DeG. J. & S. 18.

(1) *Prindergast v. Eyre*, 2 Hogan, 89; *Cunningham v. Sharp*, 11 Humph. 116. See *King v. Ruckman*, 5 C. E. Green, 316.

(2) *Poole v. Shergold*, 2 Bro. C. C. 118; 1 Cox, 273; *Lewin v. Guest*, 1 Russ. 325; *Casamajor v. Strobe*, 2 My. & K. 724; *Harwood v. Bland*, 1 Flan. & Kel. 540; *Stoddard v. Smith*, 5 Binney, 355; *Foley v. Crow*, 37 Md. 51; *White v. Dobson*, 17 Gratt. 262; *Osborne v. Bremar*, 1 Dessaus. 486.

conveyance of that very tract, then, in the absence of intentional misrepresentation by the vendor, a deficiency in the quantity which the vendee had supposed the land to contain, even though that quantity was named in the agreement, will not affect the vendor's right to a specific performance, or entitle the purchaser to compensation, unless the deficiency should be so great as to virtually defeat the purpose for which the contract was entered into by the vendee. This, of course, assumes that the purchaser was not misled, and that he had opportunities for becoming acquainted with the subject-matter, and then the principle *caveat emptor* applies to a purchase of land as well as of chattels.(1) But if the seller has misstated the quantity or number of acres, the vendee is plainly entitled to compensation for the deficiency.(2) When the land is sold by the quantity, and not by metes and bounds, but the description is guarded by such phrases as "of or about" a certain quantity, "be the same more or less," and the like, then, so long as the contract remains executory, the vendee will, as part of the specific performance of it, be entitled to compensation for a deficiency, unless it is very small and trifling;(3) but if the contract has been carried into effect by a conveyance, the grantee is not entitled to any deduction from the price or to recover back any portion of it, even when the deficiency is considerable.(4) And if the vendor was aware that the quantity stated was greater than the actual amount, such phrases inserted in the contract will have no effect upon his liability to make compensation.(5) It will not be inferred from the vendee's familiar acquaintance with the land in question, or even from his occupation of it as a tenant, that he was aware of the true quantity, so as to cut off a right of compensation to which he would be otherwise entitled.(6)

(1) See *Kent v. Carcaud*, 17 Md. 291; *Foley v. McKeown*, 4 Leigh, 627; for a case where defect in value was held not entitled to compensation, see *Edwards-Wood v. Majoribanks*, 3 De G. & J. 329.

(2) *Sir Cloudesley Shovel v. Bogan*, 2 Eq. Cas. Abr. 688 pl. 4; *Hill v. Buckley*, 17 Ves. 394; In re Gove's estate, 3 I. R. Eq. 260; *Whittemore v. Whittemore*, L. R. 8 Eq. 603; as to misstatement of value by vendor, see *Powell v. Elliott*, L. R. 10 Ch. 424.

(3) *Hill v. Buckley*, 17 Ves. 394; *Portman v. Mill*, 2 Russ. 570; *Day v. Finn*, Owen, 133; In re Egan's Estate, 6 Ir. Jur. (N. S.) 90; In re Browne's estate, 5 Ir. Jur. (N. S.) 185; but see *Winch v. Winchester*, 1 V. & B. 375.

(4) *Twyford v. Wareup*, Rep. temp. Finch, 310; Anon., 2 Freem. Ch. 108; *Lord Townshend v. Stangroom*, 6 Ves. 328.

(5) *Winch v. Winchester*, 1 V. & B. 375; *Duke of Norfolk v. Worthy*, 1 Camp. 337.

(6) *Winch v. Winchester*, 1 V. & B. 375; *King v. Wilson*, 6 Beav. 124; as to the effect of the land turning out to be of a larger quantity than that described in the contract. See *Price v. North*, 2 Y. & C. Exch. 620.

SEC. 455. Where there is something more than a mere misdescription or unintentional error, and the vendor has been guilty of an actual intentional misrepresentation—a misstatement of the subject-matter or estate or title, knowing the real facts of the case, even though the failure is so small and immaterial that without the element of knowledge and intent it would not have prevented a specific performance with or without compensation—the vendor thereby forfeits all right and claim to the aid of the court in his behalf, and a partial enforcement with compensation against an unwilling purchaser will always be denied.(1)

SEC. 456. In respect to the time at which compensation may be claimed and allowed, there is an important distinction between the demand made by the vendor and that made by the purchaser. If the vendor wishes to force a partial performance with compensation upon an unwilling vendee, he must allege all the facts and set out the whole case entitling him to relief in his bill or other first pleading whatever be its name, and must thus present the matter as one of the issues to be heard and determined in making a decree; as he is assumed to know all the facts connected with his own title, estate, and property, he cannot claim a partial performance with compensation for any defect not stated in his pleading, and first appearing in the evidence or in the allegations of the defendant's answer.(2) If the vendee is plaintiff, and wishes to compel a conveyance of what the vendor can give with compensation for defects or deficiencies, he may also allege all the facts and pray for the relief in his complaint, and this would undoubtedly be the better course; but even where he is plaintiff, and much more so where he is defendant, he may claim and obtain compensation, without any allegation in respect thereof in his pleading, for any cause appearing in the course of the judicial proceeding, even appearing upon the investigation as to title after a general decree awarding a specific performance has been made.(3) Compensation may, therefore, be granted to the vendee, *on his demand*, at any time

(1) *Viscount Clermont v. Tasburgh*, 1 J. & W. 120, per Sir T. PLUMER; *Duke of Norfolk v. Worthy*, 1 Camp. 337, 340; *Stewart v. Alliston*, 1 Meriv. 26; *Price v. Macaulay*, 2 DeG. M. & G. 339, 344; *Lachlan v. Reynolds*, Kay, 52; *Miller v. Chetwood*, 1 Green's Ch. 199; *Best v. Stow*, 2 Sandf. Ch. 298. But see *Powell v. Elliott*, L. R. 10 Ch. 424, where the vendor's misrepresentation as to value was compensated for, but the vendee did not refuse to complete, and only claimed compensation.

(2) *Bowyer v. Bright*, 13 Price, 698; *Ashton v. Wood*, 3 Sm. & Gif. 436; 3 Jur. (N. S.) 1164.

(3) *Wilson v. Williams*, 3 Jur. (N. S.) 810.

before the contract is fully completed by conveyance and payment of all the price, for any sufficient cause occurring either before or after the contract was concluded.(1) Thus, where the vendor has delayed in perfecting title, compensation has been allowed for a deterioration of the property occurring between the time when he should have completed and the time when he does complete, either from his neglect or from his intentional acts or omissions.(2) No compensation, however, can be given after the contract is finally executed by both parties by conveyance and payment of the purchase-price.(3)

SEC. 457. *Enforcement of contracts against husband or husband and wife where the wife has an interest in the land.*—I confine myself in this subdivision to questions arising where the common-law disabilities of the wife are still existing. The recent statutes of many of the states, permitting a wife to bind herself either fully or partially by her contracts, are collected in a former section. The following cases may arise: 1. Where the husband enters into a contract agreeing to convey the land, and it turns out that the husband's estate is only a partial one, while the wife owns the reversion or remainder in fee, and the question which is ordinarily presented is, whether the vendee can compel the husband to convey his partial interest with abatement for the wife's interest. 2. Where the wife has entered into a contract as a party—generally in the nature of a marriage settlement. 3. Where the husband agrees to sell land, of which he is the owner in fee, but in which his wife has an inchoate dower right, and she refuses to execute the contract by joining in a conveyance and release her dower right. This latter case does not arise in England, since dower has there long been merely nominal; and, on the other hand, the first case has seldom arisen in this country, but has frequently been presented to the English courts, because by the prevailing use of marriage and family settlements, estates in land are very often given to the wife either for life or in remainder.

SEC. 458. It seems to be settled as the general rule in England, that where a husband, who has only a life interest in possession, while the wife is owner of the fee, or perhaps has a life interest in remainder, contracts to sell and convey the whole estate to a purchaser who at the time of entering into the agreement is aware of the nature of

(1) *Frank v. Basnet*, 2 My. & K. 618; *Cann v. Cann*, 3 Sim. 447; *Prothero v. Phelps*, 25 L. J. Ch. 105; *Crompton v. Lord Melbourne*, 5 Sim. 353.

(2) *Foster v. Deacon*, 3 Madd. 394; *Nelson v. Bridges*, 2 Beav. 239; *Binks v. Lord Rokeby*, 2 Sw. 222.

(3) *Ibid.*

the ownership—that is, aware of the wife's interest—such vendee cannot compel the husband to convey his own partial estate with a compensation or abatement from the price in respect of the value of the wife's estate, a conveyance of which cannot of course be compelled.(1) But if the vendee, under the same circumstances, and entering into a like contract, was ignorant of the wife's interest and supposed, in good faith, that he was dealing with the husband as sole owner of the land, then he can compel a conveyance of the husband's partial estate with an abatement from the price with respect of the wife's interest which he cannot acquire.(2) This latter rule, however, has, in a very recent decision, been applied where the vendee had full knowledge of the wife's interest in the land.(3)

(1) This doctrine is laid down in the broadest manner by Lord HATHERLY, in the recent case of *Castle v. Wilkinson*, L. R. 5 Ch. 534, the facts and opinion being given, *ante*, in a note to section 442.

(2) *Barnes v. Wood*, L. R. 8 Eq. 424. See facts, etc., *ante*, in note to section 438. The important English cases in which the doctrine is discussed, are *Greenaway v. Adams*, 12 Ves. 395, 400; *Morris v. Stephenson*, 7 Ves. 474; *Emery v. Wase*, 8 Ves. 514; *Howell v. George*, 1 Mad. 9; *Martin v. Mitchell*, 2 J. & W. 425; *Mortlock v. Buller*, 10 Ves. 305; *Innes v. Jackson*, 16 Ves. 367; *Frederick v. Coxwell*, 3 You. & J. 514.

(3) *Barker v. Cox*, L. R. 4 Ch. D. 464; 3 Ch. D. 359. By a marriage settlement real estate was limited to such uses as A. and B. (a husband and wife) should appoint, and, in default of appointment to trustees for the use of B., the wife, during her life, with remainder to A., the husband, in fee. A. agreed to sell the land to the plaintiff, who knew of the settlement, and to procure the proper conveyances. Plaintiff paid the whole purchase-money to the trustees of the settlement. A conveyance was prepared as a joint appointment to the plaintiff by A. & B., under the settlement, but before execution A. suddenly died. B., being a woman, of course refused to carry out the contract, and convey her life estate; and, moreover, she insisted on the whole purchase-money which had been paid, being retained by the trustees, although the plaintiff would only get the remainder after her life estate. Held, on his suit, that plaintiff was entitled to a specific performance to the extent of A.'s remainder in fee, with compensation in respect of B.'s life interest, and a lien for the latter on the invested purchase-money in the hands of the trustees; in other words, the trustees were to pay him back a proportionate share of the purchase-money. Now, although this decision appears at first blush to be inconsistent with *Castle v. Wilkinson*, *supra*, yet there is, I think, a distinction between the facts, which fully accounts for the difference of the decisions. In *Castle v. Wilkinson*, the vendee knew that the wife owned an interest, and that of course she could not be compelled to convey. In the present case the vendee knew of the wife's interest, and that she could not be compelled to convey; but he also knew that both she and her husband had the power to join in a conveyance by way of appointment, and that it was contemplated by all parties that she should thus act in conjunction with her husband. He had a reasonable ground for supposing that she would join in the appointment, and on the strength of such supposition paid the whole purchase-money. It would have been grossly

SEC. 459. Where a married woman enters into a contract as a party by which she agrees to convey land, the agreement cannot, of course, be enforced against her, even when she acts as a trustee in making the contract.(1)

SEC. 460. The third case, where the wife of the vendor has an inchoate right of dower in the land which he agrees to sell, is the one which is constantly arising in this country. It seems to be settled in some of the states as a general rule, whether the vendee knew of the wife's dower interest or not, that when a contract is made with the husband, and the wife refuses to release her dower, the vendee cannot have an abatement from the price if he obtains a specific performance; he must either abandon the contract, or obtain a conveyance of the husband's estate, and sue him at law for a breach of the contract, or else content himself with the legal remedy alone.(2) The reasoning

inequitable for her to have retained the benefit of this purchase-money and still refuse to join in the appointment, which she could have done, and so the court ordered a part of the money to be returned. See *Swepson v. Rouse*, 65 N. C. 34; *Rostetter v. Grant*, 18 Ohio St. 126; In Iowa a contract by a husband alone to convey a homestead is void, and will not be enforced against him in respect to his partial interest. *Barnett v. Mendenhall*, 42 Iowa 296; and see, upon the same point, *Phillips v. Stauch*, 20 Mich. 369.

(1) *Avery v. Griffin*, L. R. 6 Eq. 606; *Nicholl v. Jones*, L. R. 3 Eq. 696. In *Frarey v. Wheeler*, 4 Org. 190, it was held that a contract of a married woman to convey her own land, made by herself and her husband jointly, will not be specifically performed by a decree in equity; but when the vendee has paid the price, taken possession, and made improvements, the land will be charged with an equitable lien for the money he has paid for the price and expended for the improvements, and such lien will be enforced by an equitable action primarily against the land, in the same manner in which a wife's contracts made by her for the benefit of her separate estate are enforced in equity. For a case in which a husband and wife, who had jointly contracted as vendors, and had executed a joint deed of the land and deposited it in the hands of a third person, to be delivered to the vendee on his payment of the price, were permitted to enforce a specific performance against the vendee, see *Farley v. Palmer*, 20 Ohio St. 223; and see *Merrill v. Bickford*, 65 Me. 118; *Smith v. Armstrong*, 24 Wisc. 446; *Stevens v. Parish*, 29 Ind. 260; *Raymond v. Pritchard*, 24 Ind. 318; *Clayton v. Frazier*, 33 Tex. 91; *Baker v. Hathaway*, 5 Allen, 103; *Seager v. Burns*, 4 Minn. 141; *Rostetter v. Grant*, 18 Ohio St. 126.

(2) This is the settled doctrine in Pennsylvania. *Clark v. Seirer*, 7 Watts, 107, 110; *Burk's Appeal*, 25 P. F. Smith, 141; *Riesz's Appeal*, 23 P. F. Smith, 485, per *SHARSWOOD, J.*: "The rule does not fall within the principle of those decisions where a vendor who cannot make a title to all he has contracted to convey, is held to be not thereby relieved from specific performance as far as in his power, but shall be compelled to execute his contract with a reasonable abatement from the price. The right of dower in the widow is of such a contingent nature, depending as it does as well upon her surviving her husband as on her continuance in life after his death, that no abatement in the price can be made which will be just to both



quoted in the note, by which this rule is supported, is certainly very unsatisfactory, and the argument by which a judge sitting in equity justifies a party in the breach of his contract, and throws the shield of his decision over the defaulting party alone, is in striking contrast with the utterances of those equity judges who have built up the system and developed its doctrines from the eternal principles of right and justice. In fact, all the grounds given by the learned judge against awarding compensation are utterly untenable. The argument that the court cannot make a new contract for the parties, would apply with exactly the same force to every case in which an abatement from the price is decreed; and, notwithstanding his *assertion*, it is plain, upon the slightest examination, that the case is identical in principle and in its particulars with all those instances of partial failure or defect of title in which compensation is always given to the vendee. The particular difficulty in the way of ascertaining compensation alleged by the judge, is shown to be no difficulty at all by two distinct considerations. *First*, if the husband himself had procured his wife to refuse, for the purpose of defeating the contract, then, as will be seen in the following paragraphs, a specific performance, with compensation, will be decreed; but on the reasoning of the court, this could not be done, since the difficulty of fixing upon the amount of the abatement is just as great in the one case as in the other—the contingency existing in the latter instance as well as in the former. But, *secondly*—and this answer is overwhelmingly conclusive—it is conceded by the court that the vendee can sue at law and recover damages against the vendor for the breach of the contract. Now, in

parties, without in effect making a new contract for them, a contract which perhaps in the first instance neither party would have come into—certainly not the vendor. Receipt of the purchase-money in full may have been the main object of the sale, to enable him to pay debts or carry out other plans. If he is to be subjected to serious pecuniary loss by his wife's refusal to join, it will operate almost as powerfully as the peril of his imprisonment, as a moral coercion and compulsion upon her to yield her consent, instead of that free will and accord which the law jealously requires her to declare by an acknowledgment upon an examination before a magistrate. The learned master, to whom it was referred to report what amount of purchase-money should be retained by the vendee upon mortgage as a compensation for him for any claim the wife might thereafter make against the premises for dower, reported that in his opinion not less than forty per cent of the price should be left in his hands for that purpose; a result no doubt just as to him, but how as to the vendor who was personally in no default? No stronger argument could be adduced to show the impolicy of making any decree. Specific performance is a matter of grace, and these are considerations which address themselves powerfully to the conscience of the chancellor." See *Burk v Serrill*, 80 Pa. St. 413; *Weller v. Weyand*, 2 Grant Cas. 103.

the action at law *the damages must be assessed upon exactly the same basis as that upon which the abatement of the price would be ascertained in equity*—if not, the assessment would be mere conjecture. If the damages can be assessed at law, notwithstanding the contingency, then, upon the same principle, and with the same ease, the compensation can be ascertained in equity. A party is dismissed from a court of equity because the relief which he asks is said to be impossible; he goes to a court of law and obtains the very same relief, on the very same facts, and in the very same manner in which he asked to have it granted in equity. In truth, a court of equity, in awarding compensation, does not necessarily require that the basis upon which the amount is ascertained should give a result with absolute accuracy; it is enough if the result can be fixed with reasonable certainty. Now, by the aid of the life tables, disclosing the probable life of the wife, the present value of her dower can be ascertained with perfect ease upon the supposition that she will survive her husband; and even if this should *possibly* be a little too large, the husband, who has entered into a contract which he cannot fulfill, is in no position to demand favor from the court, especially as the money will only be withheld for a time by the vendee, and will be paid at the expiration of the dower right by death of the wife, whether she die before or after her husband.

SEC. 461. The true *principle* is that laid down in the English cases heretofore quoted. If the vendee knows that the vendor is a married man, he knows that his wife is entitled to dower, and that she cannot be compelled to release her dower right, and entering into the contract with such knowledge, he is not entitled, within the doctrine as well established, to ask anything more than the husband himself can give. It is the vendee's knowledge, and not any notion of making a new contract for the parties, which prevents the purchaser from obtaining compensation. On the other hand, if the vendee entered into the contract in ignorance that the vendor was married, and under the supposition that the vendor could give an unincumbered title, then he ought to have a specific performance with an abatement from the price.(1)

(1) The same doctrine as laid down by the Pennsylvania court seems to have been adopted in New Jersey. *Hawralty v. Warren*, 3 C. E. Greene, 124; *Reilly v. Smith*, 25 N. J. Eq. 158; *Peeler v. Levy*, 26 N. J. Eq. 330. Compare the following cases from other states: *Davis v. Parker*, 14 Allen, 94; *Woodbury v. Luddy*, 14 Allen, 1; *Curran v. Holyoke Water Co.*, 116 Mass. 90; *Richmond v. Robinson*, 12 Mich. 193; *Phillips v. Stauch*, 20 Mich. 369; *Yost v. Devault*, 9 Iowa, 60; *Allison v. Shilling*, 27 Tex. 450; *Brewer v. Wall*, 23 Tex. 585.

SEC. 462. If the husband, vendor, actually procures or induces his wife to refuse to join in the conveyance, for the purpose of preventing an execution of the contract, it has been held that the vendee may obtain a decree for a partial performance with an abatement from the price in respect of the wife's inchoate dower, which may be worked out by way of indemnity rather than compensation; namely, by directing a portion of the price to be retained by the vendee, secured, perhaps, by a mortgage, and to be paid on the death of the wife, or the extinction of her dower right in any other manner.(1) And in some states this mode of apportioning the equities seems to be adopted as the general rule in all cases where the wife refuses to join and release her dower right.(2) But, as said above, it is not in accordance with the well-settled principles of equity that this or any other mode of compensation should be awarded to the vendee, unless he made the contract without knowledge that the vendor was married.

SEC. 463. And in this country, as well as in England, where a husband alone, or a husband and wife together, contract to sell and convey land which belongs to the wife, and in which he has a common-law interest as husband, the vendee, at all events if he was aware of the facts, cannot, of course, compel her to convey, nor could he be entitled to a decree against the husband for his interest with an abatement of the price. He must be content to take what the husband can give, paying the full price, or abandon the contract, or seek his remedy at law.(3)

(1) *Young v. Paul*, 2 Stockt. Ch. 401; *Peeler v. Levy*, 26 N. J. Eq. 330.

(2) See *Wingate v. Hamilton*, 7 Ind. 73; *Hazelig v. Huston*, 25 Ind. 481; *Springle v. Shields*, 17 Ala. 295; *Troutman v. Gowing*, 16 Iowa, 415; *Zebbley v. Sears*, 38 Iowa, 507; *Heimbürg v. Ismay*, 35 N. Y. Super. Ct. 35.

(3) *Young v. Paul*, 2 Stockt. Ch. 402; *Clark v. Seirer*, 7 Watts, 107, 110; *Evans v. Kingsbury*, 2 Rand. 120; *Watts v. Kinney*, 3 Leigh, 293; *Glassell v. Thomas*, 3 Leigh, 113, 129; *Clark v. Reins*, 12 Gratt. 98. In the last case land was owned by a number of persons jointly, among whom was a married woman who held in her own right. They all, including the wife and her husband, made a contract to sell the land. The wife refusing to join in the deed of conveyance, and the vendee suing for a specific performance, the court decreed against the other joint owners and the husband, but not against the wife, and refused to compel the husband in releasing his own estate, to make such abatement from the price as would compensate the plaintiff for his failure to obtain a conveyance of the wife's share. It is plain, in all these cases, that the principles of equity, rightly understood and correctly applied, require that compensation should be given to the purchaser if he buys in ignorance of the wife's interest. See, also, in illustration of the text, *Morss v. Elmendorf*, 11 Paige, 277; *Riesz's Appeal*, 23 P. F. Smith, 485, 491; *Bailey v. James*, 11 Gratt. 468; *Irick v. Fulton*, 3 Gratt. 193; *Graham v. Hendren*, 5 Munf. 185; *Courcier v. Graham*, 2 Ohio, 341; *Frarey v. Wheeler*, 4 Ore. 190.

SEC. 464. *Rights of the vendee when the vendor has, subsequently to the contract, sold or conveyed the land to a third person.*—There are two cases to be considered under this head: 1. Where the third person is not a *bona fide* purchaser without notice of the prior contract; and 2, where he is such a *bona fide* purchaser without notice. The distinction between these two cases, and the solution of the particular questions which may arise under them, depend upon certain doctrines of equity jurisprudence which are of very wide application. These are *first*, the rule that where the equities of two or more conflicting claimants to the same subject-matter, are equal in all other respects, the one which is prior in point of time shall prevail; *secondly*, the rule that where the equities of two or more claimants to the same subject-matter are otherwise equal, the one who has, in addition to his equitable interest, obtained the legal title, must prevail. These two principles, on the other hand, are constantly affected and modified by two other doctrines, that which determines the effect of notice upon the rights of a subsequent claimant, and that which determines the effect of an actual payment of or parting with a valuable consideration upon the rights of the claimants. In fact, the question whether the equities of the respective claimants are equal, so as to let in the operation of the two general principles first stated, or are unequal, so as to exclude the operation of these principles, depends, to a very great extent, upon the existence or absence of notice, and upon the actual payment or non-payment of a valuable consideration. I shall not attempt any discussion of these equitable doctrines. Even the most general and cursory examination of the rules concerning notice, and the payment of a consideration would transcend the scope and limits of this work, and the reader is referred to treatises upon equity jurisprudence in which these subjects are discussed in all their relations. I shall confine myself to a statement of the vendee's rights, in the two cases above mentioned, assuming, in the one case, that the subsequent grantee is not a *bona fide* purchaser for value; and in the other case, that he is such a *bona fide* purchaser.

SEC. 465. The doctrine is well settled that when the vendor, after entering into a contract of sale, conveys the land to a third person who has knowledge or notice of the prior agreement, or who does not part with a pecuniary consideration, or who for any other reason is not a *bona fide* purchaser for value, such grantee takes the land impressed with the trust in favor of the original vendee, and holds it as trustee for such vendee, and can be compelled at the suit of the vendee to specifically perform the agreement by conveying the land in

the same manner, and to the same extent, as the vendor would have been liable to do, had he not transferred the legal title; and such grantee is the proper defendant in the suit against whom to demand the remedy of a conveyance.(1) For the same reason, and in the same manner, the rights of a subsequent vendee may be cut off or foreclosed in a suit by the prior purchaser.

SEC. 466. Where the subsequent grantee is a *bona fide* purchaser for value, the equitable remedy of a specific performance, as has already been shown in a former section, becomes impossible. It cannot be enforced against the vendor, because his title has failed; nor against the grantee, because his *legal* title, based upon an actual pecuniary consideration, and upon the absence of notice, gives him a superiority over the plaintiff's equity.(2) Even when the vendor has purposely conveyed the land to such a grantee, with the express design of defeating the prior contract, the purchaser under that agreement is left to his legal action.(3) The plaintiff, in an equitable action brought to enforce specific performance, who fails to obtain that relief because the land has been conveyed by the vendor to a subsequent grantee, may, under certain circumstances, recover in the same proceeding a judgment for damages against the vendor, instead of being forced to bring a new action for that purpose. The discussion of this particular question, and of all others concerning the award

(1) *Flagg v. Mann*, 2 Sumner 487; *Foss v. Haynes*, 31 Me. 86; *Snowman v. Harford*, 57 Me. 397; *Laverty v. Moore*, 33 N. Y. 658; *Wiswall v. McGowan*, 1 Hoff. Ch. 125; *Fullerton v. McCurdy*, 4 Lans. 132; *Haughwout v. Murphy*, 6 C. E. Green, 118; 7 C. E. Green, 531; *Coates v. Gerlach*, 8 Wright, 43; *Kerr v. Day*, 2 Harris, 112, 117; *Smoot v. Rea*, 19 Md. 398; *Hunter v. Bales*, 24 Ind. 299; *Doan v. Mauzey*, 33 Ill. 227; *Keegan v. Williams*, 22 Iowa, 378; *St. Paul Division v. Brown*, 9 Minn., 157; *Bryant v. Booze*, 55 Geo. 438; *Gregg v. Hamilton*, 12 Kans. 333; *McMorris v. Crawford*, 15 Ala. 271; *Dickinson v. Any*, 25 Ala. 424; *Johnson v. Bowden*, 37 Tex. 621; *Scarborough v. Arrant*, 25 Tex. 129. The same doctrine is settled in England. *Barnes v. Wood*, L. R. 8 Eq. 424; *Potter v. Sanders*, 6 Hare, 1. It is held in *Warren v. Richmond*, 53 Ill. 52; *Little v. Thurston*, 58 Me. 86, that a subsequent sale by the vendor to a third person entitles the prior purchaser to treat the contract as rescinded. The following cases are special in their facts, but depend upon the principle stated in the text. *Bird v. Hall*, 30 Mich. 374; *Cole v. Cole*, 41 Md. 301; *Smith v. Kelley*, 56 Me. 64; *Borders v. Murphy*, 78 Ill. 81; *Frantz v. Orton*, 75 Ill. 100; *Rostetter v. Grant*, 18 Ohio St. 126; *Reavis v. Reavis*, 50 Ala. 60.

(2) *Hatch v. Cobb*, 4 Johns. Ch. 559; *Lewis v. Yale*, 4 Flor. 418; *Sims v. McEwen*, 27 Ala. 184; *Scott v. Billgerry*, 40 Miss. 119; *Richmond v. Dubuque R. R.*, 33 Iowa, 422; and see the cases cited under § 464, and *ante*, § 294.

(3) *Hatch v. Cobb*, 4 Johns. Ch. 559; *Kempshall v. Stone*, 5 Johns. Ch. 194; *Smith v. Kelley*, 56 Me. 64; and *ante*, § 94.

of damages in place of or in addition to the equitable remedy, is reserved for the section immediately following the present one.(1)

SEC. 467. If, during the pendency of a suit brought by the purchaser to compel a specific performance, the vendor (defendant) conveys the land to a third person, the court of equity does not thereby lose its jurisdiction, even though the subject-matter should have been put beyond its reach by a transfer to a *bona fide* grantee for value. It is still able to award whatever remedy is adapted to the particular circumstances of the case, either pecuniary damages against the vendor, or, by bringing in the grantee as an additional defendant, a decree for the payment of the purchase-price by the vendor or his grantee to the plaintiff, or a specific performance against the grantee himself, if he is not a *bona fide* purchaser.(2) If the rules of procedure have been observed by the plaintiff, and he has properly filed a notice of *lis pendens*, it is, of course, impossible for the vendor to convey the land during the suit beyond the reach of the plaintiff and of the court.

SEC. 468. Although a conveyance before notice may carry the land beyond the reach of the prior vendee, yet the trust which had affected the land in the hands of the vendor will attach to the unpaid purchase-money due from the grantee to the vendor. This purchase-money becomes a fund taking the place by substitution of the land. The vendee can, therefore, compel the grantee to pay over to himself whatever portion of the purchase-price is yet unpaid, and can recover from the vendor whatever portion the latter has received. As against the grantee he is subrogated to the rights of the vendor, and as against the vendor he can claim the money in place of the land. Even if the subsequent grantee is not a *bona fide* purchaser, so that the vendee can reach the land in his hands, such vendee may, if he elect, waive his right to the land, may treat the conveyance as absolute, and may transfer his claim to the purchase-price in the same manner and to the same extent as above stated.(3) Equity never suffers a trust to be defeated by a conversion of the subject-matter, so long as the trust fund, under whatsoever form, can be traced in the hands of those who would be liable in respect of the original subject-matter, if it had remained *in specie* under their control.

(1) See Sect. V. of this chapter.

(2) *Snowman v. Harford*, 57 Me. 397; *Masson's Appeal*, 20 P. F. Smith, 27, 29; *Chapman v. Mad River R. R.*, 6 Ohio St. 119, 139.

(3) *Haughwout v. Murphy*, 7 C. E. Green, 531; *Dustin v. Newcomer*, 8 Ohio, 49; *Cliver v. Croswell*, 42 Ill. 41; *Tenney v. State Bank*, 20 Wisc. 152, 164.

## SECTION V.

*Damages when given in place of, or in addition to, a specific performance.*

SECTION 469. In addition to the compensation—which in most cases takes the form of an abatement of the purchase-price agreed to be paid—awarded to a vendee in connection with a partial enforcement of the contract, a court of equity may, under certain circumstances, as has already been shown, grant the relief of damages for a breach by the vendor of the whole or some portion of his agreement, either in addition to or in place of the purely equitable remedy of a specific performance. That a court of equity has the power, in a proper case, to do full justice and confer complete relief in one judicial proceeding, by giving damages in connection with some other kind of relief, and, even alone, is a familiar doctrine. I purpose in the present section to show how far, and under what circumstances, this doctrine is applied in suits for a specific performance. Before proceeding with any examination of the subject in general, or of its particular doctrines and rules as enforced by the courts of this country, a brief statement of the recent legislation concerning it in England, and of the judicial construction put upon that legislation, will be instructive; especially since the fundamental principles of the English statutes have been incorporated with more or less definiteness into the reformed system of procedure which now prevails in so many of the American commonwealths.

SEC. 470. By the act commonly known as "Lord Cairn's Act," which went into operation in 1858,(1) it was provided, among other things, that "in all cases in which the court of chancery has jurisdiction to entertain an application \* \* \* for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such \* \* \* specific performance, and such damages may be assessed in such manner as the court shall direct." In interpreting this statute the English courts have settled the doctrine that it does not enlarge the jurisdiction of equity by extending its power to grant relief over any cases which did not previously fall within its scope. The design of the legislation was to enable a court of equity to do complete justice in cases where it previously had jurisdiction to decree a specific per-

(1) The Chancery Amendment Act, 21 and 22 Vict., ch. 27, § 1.

formance, but in which, from the special circumstances, events, or acts of the defendant, that peculiar relief had been made impracticable, and the plaintiff would, therefore, be forced to sue at law for damages. In order that the statute may apply, the case in which damages are demanded and given, must be *one of a class* over which equity had and still has jurisdiction to compel a specific performance. It is not necessary, however, that the case should be one in which, *upon its particular facts*, the court would, or even could, have granted that remedy. Indeed, the statute is expressly directed at this latter kind of cases. Before its passage, if a case belonged to a class over which equity has an undoubted jurisdiction—for example, if it were one arising upon a contract for the sale of land—but if from its particular circumstances, or the acts of the defendant, the relief of a specific performance had been made impossible, so that at the time of commencing his suit the plaintiff's right to the equitable remedy was lost, then a court of equity had no power to give damages, because it had no power from the special facts of that particular case to grant a specific enforcement, and the plaintiff was, therefore, confined to his action at law. The very object of the statute was to change this rule, and to enable a court of equity to give damages in such a case. As an illustration, if after entering into a contract for the sale of certain land, the vendor should, before completion, convey the property to another *bona fide* purchaser, the vendee would not be able to compel a specific execution of the agreement, since the vendor could not make a title. Prior to the statute, the vendee could not have maintained a suit in equity for the purpose of recovering damages, because at the time of filing his bill there was no foundation of fact upon which to base a decree of specific performance; but under the statute the suit can be maintained merely for damages. It is plain that unless the statute has effected this change, it has done no more than enact the rule which had long existed as a part of the equity jurisdiction. I have dwelt thus carefully upon the construction given to the English statute, because it must be contrasted with the narrow course of decision which has been adopted by the courts in some of our states inapplying a legislation involving the same general principles.

SEC. 471. The foregoing interpretation is fully sustained by the decisions. It is settled that the act does not extend the jurisdiction of equity to any cases or class of cases, which were not previously within the scope of that jurisdiction.(1) A court of equity is not

(1) *Wicks v. Hunt*, Johns. 372, 380.



enabled by the statute to grant the relief of damages in any cases except those over which, as a class, it has the jurisdiction to decree a specific enforcement, and the damages when given must be in place of or in addition to that equitable remedy. In other words, where the plaintiff fails to establish any covenant, contract or agreement of which a specific performance *can* be decreed, a court of equity has no power under the statute to grant the relief of damages.(1)

SEC. 472. As illustrations of this doctrine, it has been held in a suit brought upon an agreement to enter into a partnership, that a court of equity had no jurisdiction to enforce specific performance of such contracts, and, therefore, had no authority to award damages for their breach ; (2) and that as a contract of agency cannot be specifically enforced, damages for its breach cannot be given ; (3) also, that as a contract to borrow a sum of money cannot be specifically enforced, damages will not be given in a suit in equity against a defendant who has refused to accept a loan of money which he had agreed to take.(4) It is also held that damages will not be granted when the specific performance of a contract has been prevented or made impracticable by the acts of the plaintiff himself ; (5) and that the authority under the statute to give damages is discretionary, and will not be exercised where the question is one which can be better determined in an action at law.(6)

SEC. 473. On the other hand, it is settled that the only condition to the application of the statute is the fact that the court has jurisdiction to grant the relief of specific performance in the case, even though such relief cannot be extended to the whole of the contract. If, therefore, a court of equity has jurisdiction to decree a specific execution of a part of a contract, it may in the same suit award damages for the breach of other parts or provisions of the contract which are of

(1) *Lewers v. Earl of Shaftesbury*, L. R. 2 Eq. 270 ; *Scott v. Rayment*, L. R. 7 Eq. 112 ; *Rogers v. Challis*, 27 Beav. 175 ; *Chinnock v. Sainsbury*, 30 L. J. (N. S.) Ch. 409 ; *Ferguson v. Wilson*, L. R. 2 Ch. 77 ; *Durell v. Pritchard*, L. R. 1 Ch. 244.

(2) *Scott v. Rayment*, L. R. 7 Eq. 112.

(3) *Chinnock v. Sainsbury*, 30 L. J. (N. S.) Ch. 409.

(4) *Rogers v. Challis*, 27 Beav. 175.

(5) *Collins v. Stubly*, 7 W. R. 710.

(6) *Durell v. Pritchard*, L. R. 1 Ch. 244. In *Corporation of Hythe v. East*, L. R. 1 Eq. 620, the plaintiff had obtained a decree for the specific performance of a covenant, and moved for an order assessing his damages for the breach of such covenant up to the then present time ; but the court said that it had no jurisdiction under Lord Cairn's Act to make the assessment

such a nature that they cannot be specifically enforced.(1) And in cases where for any special causes the court declines to grant a specific performance, it may, in place thereof, give a judgment for damages.(2)

SEC. 474. I pass now from this English legislation to a consideration of the circumstances under which equity, in virtue of its own inherent jurisdiction, and without any statutory aid, will grant the relief of damages; and I shall confine the discussion to the rules which have been formulated by the decisions of the American courts. All the instances in which equity thus awards damages, either in

(1) *Middleton v. Greenwood*, 2 DeG. J. & S. 142; *Soames v. Edge*, Johns. 669; and see *Lillie v. Legh*, 3 DeG. & J. 204. In the first of these cases the defendant made a written contract whereby he agreed to give the plaintiff a lease of a certain public house for a term of years, and further agreed to make certain alterations and repairs in the building, namely, to construct a spirit vault, put in plate-glass windows, paint all the wood-work, and repair the roofs. The plaintiff sued, asking a specific performance of the contract, so far as the agreement to give a lease went, and damages for defendant's breach of the other provisions which it was conceded could not be enforced, and this relief was granted by V. C. PAGE-WOOD, and his decree was affirmed by the lords justices. The case of *Soames v. Edge*, *supra*, was similar with the parties reversed. Plaintiff agreed to give a lease of certain lands to defendant, who was in possession of them, as soon as defendant should have pulled down a certain house thereon and built a new one; and defendant agreed that he would, within a specified time, pull down the old house, erect a new one, and accept the lease. A suit being brought, a decree was made directing a specific performance of the agreement to take the lease, and awarding damages for defendant's breach of his agreement to build, which latter agreement, it was conceded, could not be specifically enforced. PAGE-WOOD, V. C., gave the following reasons for the decision: "It is perfectly true that I cannot act until I have jurisdiction, and under the existing law, before the passage of Lord Cairn's Act, a court of equity had not jurisdiction in respect of a building contract of this description. But it would have had jurisdiction, before the passing of the act, to compel the defendant to accept a lease. The defendant has agreed to accept a lease when required, and the court has, therefore, jurisdiction. The statute would not apply to a case where the object of the agreement was simply the building of the house under such conditions, and on such terms that it may be assumed the court could not grant specific performance; and in such a case a plaintiff could not file a bill to have damages instead of specific performance, because there would be no jurisdiction. But there is a distinct agreement here, not only to build the house, but to accept the lease. The court having, therefore, acquired jurisdiction, may give damages either in addition to or in substitution for specific performance. The meaning of the statute can only be, that where the court has jurisdiction in the suit, it may award damages in the substitution for specific performance." See, also, *De Brassac v. Martin*, 11 W. R. 1020; *Howe v. Hunt*, 31 Beav. 420; *Cory v. Thames*, etc., 11 W. R. 589; *Norris v. Jackson*, 1 Johns. & H. 319; 3 Giff. 396.

(2) See, as illustration, *Howe v. Hunt*, 8 Jur. (N. S.) 834; *Samuda v. Lawford*, 8 Jur. (N. S.) 739.

place of or in addition to some other special remedy, are particular applications of the one general principle, that complete justice should be done between litigant parties whenever jurisdiction has been acquired over them to grant any relief. This doctrine is well established, and is, indeed, too familiar to require the citation of authority, that whenever a court of equity has once acquired jurisdiction of a cause, it will retain such cause in order to do full and complete justice between the parties with respect to the subject-matter. To this end, when jurisdiction has been obtained on other grounds, and for the purpose of administering an equitable remedy, damages may be assessed and adjudged in lieu of or as ancillary to the equitable relief, so that the plaintiff may not be put to the trouble, expense, and delay of a second suit brought in another tribunal.(1)

SEC. 475. All further discussion consists simply in applying this doctrine to different cases of specific performance. The rule was settled prior to any statutory modification, and still prevails in most of the states, that where a specific performance was impossible at the time of commencing the suit, and this fact was known to the plaintiff, no recovery of damages can be given for the defendant's violation of his contract. If, through defect in his title, or any other cause, the defendant was never able to complete by a conveyance, or if the defendant has, subsequently to his agreement, disabled himself from completion by conveying the subject-matter to a *bona fide* grantee for value, and the vendee being aware of the real condition of affairs, brings his suit for a specific performance, knowing that such remedy cannot be granted, then as a general rule the court of equity will not retain the action for the purpose of awarding damages to the plaintiff in place of his specific relief, but will dismiss the suit and leave the plaintiff to pursue his remedy in the form of a legal action.(2) Some exceptions to this rule have been admitted by American decisions, which will be noticed hereafter. The knowledge required on the plaintiff's part is not necessarily an absolute certainty, an affirmative intellectual conviction. If at the time of bringing his suit the plaintiff is informed of the real facts—of the defect in the defendant's title, or of the defendant's subsequent conveyance, and there are no other

(1) *Wiswall v. McGown*, 2 Barb. 270; *Holland v. Anderson*, 33 M. 53; *Story Eq. Jur.*, §§ 794, 796-798.

(2) *Hatch v. Cobb*, 4 Johns. Ch. 559; *Kempshall v. Stone*, 5 Johns. Ch. 194; *Morss v. Elmendorf*, 11 Paige, 277; *Smith v. Kelley*, 56 Me. 64; *McQueen v. Chouteau*, 20 Mo. 222; *Doan v. Mauzey*, 33 Ill. 227; *Gupton v. Gupton*, 47 Mo. 37; *Milkman v. Ordway*, 106 Mass. 232, 253; *Sternberger v. McGovern*, 56 N. Y. 12, 20; and see cases in the following notes.

circumstances which could alter the presumption—then he is presumed to know the legal consequences of those facts; the law infers his knowledge that a specific enforcement cannot be decreed. The reason given for this rule, is the want of any jurisdiction in a court of equity to entertain a suit for a specific performance under the circumstances. At the very commencement of the proceeding the court has no jurisdiction to grant the specific remedy, and, therefore, the case does not fall within the general principle stated above as the foundation of all relief of damages granted by courts of equity. Although this reasoning is based upon an entire misconception of the meaning of “jurisdiction,” yet it has been generally adopted by the courts, and the rule resulting from it has become so firmly settled that even the sweeping reforms made by the new procedure have not led the courts to change it in most of the states where that procedure prevails.

SEC. 476. If, at the time of commencing the suit for a specific performance, the remedy was possible, the vendor being owner of the land by a sufficient title, but pending the action the defendant puts it out of his own power to perform his agreement, and renders the specific relief impossible by conveying the subject-matter to another *bona fide* grantee for value, then, on these facts being disclosed, the court of equity will not dismiss the action and put the plaintiff to the delay and trouble of a second proceeding, but will assess his damages and grant a pecuniary judgment instead of the specific relief originally demanded.<sup>(1)</sup> It is plain that this case fully satisfies the general principle of equity before stated; for the court obtained jurisdiction over the parties and over the subject-matter, and, of course, there was no knowledge on the plaintiff's part which should have prevented him from bringing the suit.

SEC. 477. The American decisions, by a strong preponderance of authority, have gone much further than the rule laid down in the last paragraph. Although there is some dissent to be found in earlier authorities, the following doctrine is now fully established throughout the states. If, at the time of concluding the contract, a specific performance was possible, and subsequently to that date, but before the commencement of the suit, the vendor disables himself from perform-

(1) *Woodcock v. Bennett*, 1 Cow. 711; *Morss v. Elmendorff*, 11 Paige, 277; *Milkman v. Ordway*, 106 Mass. 232, 253, per WELLS, J.; and see cases cited in the next following note. This rule was, as it seems, the extent to which the English decisions were willing to go, prior to “Lord Cairns' Act;” although there are a few earlier cases which adopted the rule stated in the next paragraph. As to the correctness of this particular rule, there has never been any doubt; all the authorities, English and American, are here in agreement.

ing by a conveyance to a third person, and even if the disability existed at the very time of entering into the agreement by reason of a defect in the vendor's title, right, or capacity to complete the contract on his part, then in either of these cases a court of equity will retain the action, and award damages to the vendee (plaintiff) in place of the specific equitable relief, provided the plaintiff commenced his action for a specific performance without knowledge of the existing disability, in good faith, supposing and having reason to suppose himself entitled to such equitable remedy, and the impossibility of specific performance is first disclosed by the defendant's answer or in the course of the hearing. In other words, where the plaintiff (vendee) brings his suit for a specific enforcement in ignorance of any impossibility, and supposing and *having reason to suppose* himself entitled to that equitable remedy, and the impossibility of performance is first disclosed to him in the proceedings after the commencement of the action, it is immaterial whether this impossibility actually arose after the contract was concluded by means of the defendant's voluntary act in conveying away the land, or whether it existed at the very time of entering into the agreement by means of a defect in the title or any other cause. In either case, the action having been brought in good faith, the court of equity will not dismiss it upon the disclosure of the real facts, but will proceed to assess the plaintiff's damages, and will grant him a pecuniary judgment in lieu of the equitable remedy which he asked and to which he supposed himself entitled.(1)

(1) The doctrine resulting from the American cases is so well stated by WELLS, J., in the recent case of *Milkman v. Ordway*, 106 Mass. 232, 253, that I shall give the passage in full: "It is settled with little or no conflict of authority, that where a defendant in a bill in equity dis enables himself, pending the suit, to comply with an order for specific relief, the court will proceed to afford relief by way of compelling compensation to be made; and for this purpose will retain the bill, and determine the amount of such compensation, although its nature and measure are precisely the same as the party would otherwise recover as damages in an action at law. There is also authority for the application of the same rule where the disability was caused before suit, but after the date of the agreement. In this country it seems to be generally accepted as the rule, provided the plaintiff brought his bill without knowledge of the disability. in good faith seeking the equitable relief, supposing and having reason to suppose himself entitled to such equitable relief. In the opinion of a majority of this court, there is equal ground in equity for applying the same rule with the same qualification, to all cases where a defect of title, right, or capacity in the defendant to fulfill his contract, is disclosed by his answer or in the course of the hearing." That is, to cases where the defect or impossibility actually existed at the date of

SEC. 478. In some of the states the courts have gone a step further, and have allowed damages, even though the plaintiff knew or had reason to know at the time of bringing his suit that a specific performance was impossible; but only when such relief in the equity action is necessary to prevent a failure of justice. As an illustration, if a suit is brought to specifically enforce a parol contract within the statute of frauds, the relief being sought on the ground of a part performance, and it turns out on the trial that there has been no sufficient part performance, or for any other defect or failure the specific relief is improper, damages, according to certain decisions, may be given on the ground that otherwise the plaintiff would be without remedy, since no action could be sustained on the agreement in a court of law.(1) According to other authorities the plaintiff may, under the same circumstances, recover back the moneys which he has advanced or expended under and by virtue of the parol agreement,

the contract. The recent case of *Chartier v. Marshall*, 56 N. H. 478, fully sustains the rule as laid down in the latter clause of the foregoing extract, and in the text. The plaintiff was held entitled to damages where the impossibility disclosed, during the proceedings in the action, had actually existed from the inception of the contract, being caused by a defect in the vendor's title. See, also, *Denton v. Stewart*, 1 Cox, 258; *Greenaway v. Adams*, 12 Ves. 393; *Att'y-Gen. v. Deerfield River Bridge*, 105 Mass. 1; *Peabody v. Tarbell*, 2 Cush. 226; *Andrews v. Brown*, 3 Cush. 130; *Pingree v. Coffin*, 12 Gray, 288, 305; *Woodcock v. Bennett*, 1 Cow. 711; *Wiswall v. McGown*, 1 Hoff. Ch. 125; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273; *Morss v. Elmendorff*, 11 Paige, 277; *Woodward v. Harris*, 2 Barb. 439; *Berry v. Van Winkle*, 1 Green Ch. 269; *Copper v. Wells*, Saxton, 10; *Rees v. Smith*, 1 Ohio, 124; *Gibbs v. Champion*, 3 Ohio, 335; *Jones v. Shackleford*, 2 Bibb, 410; *Fisher v. Kay*, 2 Bibb, 434; *Rankin v. Maxwell*, 2 A. K. Marsh. 488; *Slaughter v. Tindle*, 1 Littell, 358; *Hopkins v. Gilman*, 22 Wisc. 476; *Hall v. Delaplaine*, 5 Wisc. 206; *McQueen v. Chouteau*, 20 Mo. 222; *Tenney v. State Bank*, 20 Wisc. 172; *O'Meara v. North Am. Ins. Co.*, 2 Nev. 112; *Carroll v. Wilson*, 22 Ark. 32; *Harrison v. Deramus*, 33 Ala. 463; *Stevenson v. Buxton*, 37 Barb. 13; *Foley v. Crow*, 37 Md. 51.

(1) *Hamilton v. Hamilton*, 59 Mo. 232; *Gupton v. Gupton*, 47 Mo. 37, 47. In the first of these cases the action was for the specific enforcement of a parol contract to convey land, which was claimed to have been part performed. The plaintiff, failing in his case for equitable relief, was allowed to recover damages. In the second case, *Bliss, J.*, after examining the earlier New York decisions, laid down the doctrine as follows: "The doctrine of these cases is simply this: when the vendor conveys the property to a third person in such a manner that the land cannot be reached, the court will not entertain a suit in equity for a specific performance merely for the purpose of compensating the purchaser in damages. Some ground for equitable interference will be required; as that the contract is by parol, void under the statute of frauds, and cannot be enforced at law; or that the vendor has conveyed away all his property, so that a judgment for damages merely would be useless."

although he may not obtain damages for the defendant's breach of the contract.(1)

SEC. 479. In an action for the specific performance of a parol contract, on the ground of a part performance, a court of equity, in decreeing this remedy, cannot also give damages for an independent cause of action growing out of the agreement void by the statute of frauds. In decreeing the specific performance of a verbal contract which has been partly performed, the court is governed by the same principles as upon a written contract valid by the statute. If the vendor is not able to fully comply with his agreement, the plaintiff will be allowed to obtain a partial performance to the extent of the seller's ability, and to have compensation by way of abatement out of the purchase-money for any deficiency in the title, quantity, or other matter touching the estate. But the court will not go further, and give the plaintiff damages in addition for a breach of an independent stipulation of the agreement upon which no action at law could be sustained under the statute of frauds.(2)

SEC. 480. One further question remains to be considered. Whether the reformed procedure adopted in so large a portion of the states has abrogated or modified any of the foregoing rules concerning the recovery of damages in the action for a specific performance. While that procedure does not purport to make any change in legal and equitable rights, duties and remedies, or reliefs, it does abolish all distinctions between legal and equitable actions, and provides one civil action for the trial of all controversies in which legal and equitable causes of action and defenses may be united, and legal and equitable remedies may be granted by a single judgment. In other words, this procedure expressly and intentionally removes at one blow all the grounds and reasons upon which, under the ancient system, the rule was based which forbids the award of damages in equity suits. Independently of any authority, it would seem to be perfectly clear that the general rules which had been established as a part of

(1) *Green v. Drummond*, 31 Md. 71; *Hilton v. Duncan*, 1 Coldw. 313; *Rider v. Gray*, 10 Md. 282; *King v. Thompson*, 9 Peters, 204; *Evans v. Battle*, 19 Ala. 398; *Adey v. Echols*, 18 Ala. 353; but see, *per contra*, *Horn v. Luddington*, 32 Wisc. 73, 79.

(2) *Harsha v. Reid*, 45 N. Y. 415. A verbal contract to convey land and a growing crop of flax upon it, was part performed by the vendees taking possession and payment. In his suit for a specific performance the doctrine of the text was laid down by the court; the contract was specifically enforced, but damages were refused for defendant's breach of a warranty as to the quality of the flax which he had given as a part of the entire agreement.

the former procedure, had been materially modified by this sweeping reform. The question thus suggested has been directly answered by the New York court of appeals. An action was brought by a vendee praying the specific enforcement of a contract. Through a failure of the defendant's title a specific performance was impossible, and this inability was known to the plaintiff before the commencement of his suit. The complaint alleged all the facts necessary to show a cause of action for damages, as well as for a specific enforcement, but only demanded the latter relief. The court refused the specific performance, but held the plaintiff entitled to recover damages for the defendant's breach of the contract. Admitting the rule to have been settled, under the former procedure, that where a plaintiff was aware of the inability at the time of commencing his suit, equity would not retain the case and give damages, the court declared that this rule had been abrogated by the Code, and it laid down the general doctrine as follows: If a complaint states facts constituting a cause of action for a specific performance, and also one for damages for a breach of the contract, a failure of the first will not prevent his recovery on the second, whatever may have been the prayer for relief.(1)

SEC. 481. The question seems to have been differently decided in other states. In Wisconsin the court has announced a doctrine directly opposed to that maintained by the New York judges, and notwithstanding the provisions of the reform legislation, keeps up the distinctions between legal and equitable actions, as though there were two courts and two distinct jurisdictions.(2) Several of the cases cited under the preceding paragraphs, which reaffirm the rules as settled by the equity tribunals, were decided by the courts of states in which the new procedure had been adopted, and they do not recognize any change as having been made in those rules.(3) In my opinion the conclusion reached by the New York court is in complete harmony with the intent and spirit of the Codes of Procedure, and is in exact conformity with their letter; but as I have in another work examined this subject in all its relations, I shall attempt no discussion of it here.(4) It is, however, very instructive to compare the readiness and completeness with which the English judges accepted the modifications made by Lord Cairns' Act, and carried out the spirit of that legislation in their decisions, so as to render the statute practically

(1) *Sternberger v. McGovern*, 56 N. Y. 12, 20, 21.

(2) *Horn v. Luddington*, 32 Wisc. 73, 79.

(3) See cases cited *ante*, under §§ 474, 476.

(4) See *Pomeroy on Remedies by the Civil Action*, §§ 76-85.



remedial, with the reluctance and unwillingness shown by so many of the American courts to acknowledge and carry into operation the essential principles of the Reformed Procedure concerning the amalgamation of legal and equitable methods. Lord Cairns' Act simply makes a slight modification in one of the rules which had aided in keeping up the distinction between equitable and legal actions and recoveries; the American legislation goes to the very root of these distinctions, and expressly abrogates them. And yet we have this most remarkable result, that the decisions under Lord Cairns' Act have gone further in permitting the legal relief of damages to be administered in equity actions, than the courts of many of the American states have done under a system which does not recognize any "suits in equity," or any "actions at law," and which expressly enacts that equitable and legal causes of action and defenses may be united, and equitable and legal remedies may be obtained in one and the same judicial proceeding called a "civil action."

## CHAPTER IV.

## PROCEDURE IN THE SUIT FOR A SPECIFIC PERFORMANCE.

## SECTION I.

*The parties.*

SECTION 482. It is not my purpose to describe all the steps in the suit for a specific performance. The rules which relate to the pleading, practice and evidence are the same which regulate all equitable actions, modified simply by the nature of the subject-matter; and their discussion belongs to works which treat of equity pleading and practice in general. Furthermore, the systems of procedure prevailing in the various States are so numerous and so different, that a discussion of these subjects, full and detailed enough to be of any practical value, would far transcend the limits of this volume—would, in fact, require a volume by itself. In England certain steps in the suit for a specific performance are well settled by the equity practice, the preliminary hearing, the reference to a master, the examination before the master concerning the title and other incidents, his report, and the proceedings thereon, and the final hearing; no such uniform practice prevails in this country. I shall, therefore, confine myself to those matters which are special and peculiar to the suit for a specific performance, and which distinguish it from other equitable actions; and the most important of these matters is The Parties.

SEC. 483. *The general rule.*—The general doctrine is well settled in England, that the immediate parties to the contract, or the persons who have become substituted in their place, as the heirs, executors, administrators, devisees, and under some circumstances, assignees or grantees are the only proper parties, plaintiff or defendant. The suit for a specific enforcement of a contract cannot be combined with a cause of action for relief against other persons claiming an interest in the same subject-matter, cannot be made to determine the titles of other claimants, nor to foreclose the liens of prior or subsequent incumbrancers. Third persons, therefore, not parties to the contract, and claiming or holding interests or equities adverse to or inconsistent with those of the vendor or of the vendee, cannot, according to this rule, be joined as co-plaintiffs or co-defendants, even though their consent

and acts may perhaps be necessary in perfecting the vendor's title and in completing his conveyance.(1) This rule, restricting the proper parties to the suit to the original parties to the contract, and to those who have succeeded to their rights, has been followed by some of the American decisions.(2) The evident tendency of the American courts, however, is towards the adoption of a more comprehensive rule than the one which prevails in England; and to admit, if not to require as parties to the suit many classes of persons who are not parties to the contract, nor the representatives of such parties, but who have acquired an interest in the subject-matter and in the relief, even though it be hostile to that of the vendee and of the vendor. The general doctrine, as supported by the weight of American authority,

(1) *Tasker v. Small*, 3 My. & Cr. 63, 69, per Lord COTTENHAM; *Mole v. Smith*, Jac. 490, 494, per Lord ELDON; *Wood v. White*, 4 My. & Cr. 460, 470, 483; *Robertson v. Great Western Ry. Co.*, 10 Sim. 314; *Humphreys v. Hollis*, Jac. 73; *Pater-son v. Long*, 5 Beav. 186; *Peacock v. Penson*, 11 Beav. 355; *Daking v. Whimper*, 26 Beav. 568; *Petre v. Duncombe*, 7 Hare, 24; *West Midland Ry. Co. v. Nixon*, 1 H. & M. 176; *Cope v. Parry*, 2 J. & W. 538; *De Hoghton v. Money*, L. R. 2 Ch. 104, 170; *Bishop of Winchester v. Mid Hants Ry. Co.*, L. R. 5 Eq. 17; *Aberaman Iron Co. v. Wickens*, L. R. 4 Ch. 101, 111; *Fenwick v. Bulman*, L. R. 9 Eq. 165; *Chadwick v. Mader*, 9 Hare, 188; *Spence v. Hogg*, 1 Coll. 225; *Collett v. Hover*, 1 Coll. 227; *Cutts v. Thodey*, 13 Sim. 206; *Leuty v. Hillas*, 2 De G. & J. 110; *Corber v. Morgan*, 18 Ves. 344; *B—— v. Walford*, 4 Russ. 372. As illustrations of this rule: A tenant under the vendor of the land contracted to be sold, was held not a necessary nor proper party in a suit by the vendor, in *Robertson v. Great Western Ry. Co.*, 10 Sim. 314; nor is a sub-purchaser from the vendee a proper party in a suit by the vendor. *Cutts v. Thodey*, 1 Coll. 223; *B—— v. Walford*, 4 Russ. 372. Judgment-creditors of the vendor, whose judgments are specific liens on the land, are not proper parties. *Petre v. Duncombe*, 7 Hare, 24, 28. In an action by the vendor a person who held an interest under a prior contract with the vendor was declared not to be a proper party, although he was interested in the purchase-price. *Peacock v. Person*, 11 Beav. 355; but in *West Midland Ry. Co. v. Nixon*, 1 H. & M. 176, a person claiming an interest in the purchase-price by virtue of a prior contract with the vendor, was held to be a proper party in a suit by the vendee against the vendor; and see *Chadwick v. Maden*, 9 Hare, 188; and where a third person has, after the making of the contract, acquired an interest in the subject-matter under the vendor, but with notice of the vendee's rights, he is a proper co-defendant with the vendor in a suit by the vendee. *Spence v. Hogg*, 1 Coll. 225; *Collett v. Hover*, 1 Coll. 227; *Cutts v. Thodey*, 13 Sim. 206; *Leuty v. Hillas*, 2 De G. & J. 110. See, also, *Nelthorpe v. Holgate*, 1 Coll. 203; *B—— v. Walford*, 4 Russ. 372, where the vendor agrees with a third person to convey to him the land purchased from the vendor, or agrees that the vendor shall convey the land to him, such third person is a necessary co-plaintiff with the vendee in a suit against the vendor.

(2) *Willard v. Tayloe*, 8 Wall. 557; *Morgan v. Morgan*, 2 Wheat. 290; *Fagan v. Barnes*, 14 Flor. 53, 57; *Knott v. Stephens*, 3 Oreg. 269; *Bacot v. Wetmore*, 2 C. E. Green (17 N. J. Eq.) 250.

is that all persons who are interested in the enforcement of the contract *must* be, and all those directly and specifically interested in the subject-matter *may* be joined as parties to the suit for a specific performance.(1) I shall proceed to illustrate the general doctrine, as it has been applied in particular cases, to determine who are and who are not necessary or proper parties; and shall consider separately the cases of plaintiffs and defendants.

SEC. 484. *First. The parties plaintiff.—I. When the suit is on behalf of the vendee.*—If a tract of land is sold in separate parcels to different purchasers, the latter cannot unite in one suit for a specific performance against the vendor, since each sale is a distinct transaction; but if there is only one contract of sale covering the land in question to several persons, although they may have stipulated for unequal shares, then the purchasers may unite; and it is not necessary that they should be jointly interested, in the strict sense of the term; it is enough if they have common or concurrent interests in the subject-matter.(2) Where the vendee enters into a contract to purchase certain land from the vendor, and had previously agreed with A. to sell and convey the land to him on obtaining a deed of it, the vendee and A. are proper co-plaintiffs in a suit against the vendor.(3) And if A. agrees to purchase from B., and then enters into a contract with C. that B. shall convey the land to C., of which second contract B. has notice, A. and C. must unite

(1) *McCotter v. Lawrence*, 6 T. & C. 392; 4 Hun, 107; *Curran v. Holyoke Water Co.*, 116 Mass. 90; *Seager v. Burns*, 4 Minn. 141, 145; *Agard v. Valencia*, 39 Cal. 292; *Hays v. Hall*, 4 Port. (Ala.) 374; *McMorris v. Crawford*, 15 Ala. 271; *Caldwell v. Taggart*, 4 Pet. 190; *Bogan v. Camp*, 30 Ala. 276; *Crosby v. Davis*, 9 Iowa, 98; *Morris v. Hoyt*, 11 Mich. 9; *Stone v. Buckner*, 12 Sm. & Mar. 73; *White v. Watkins*, 23 Mo. 423; *Anshutz's Appeal*, 34 Pa. St. 375; *Allison v. Shelling*, 27 Tex. 450. Thus, in *McCotter v. Lawrence* (*supra*), it was said that all persons interested in the subject-matter as holders of the legal or equitable titles to the land, are necessary parties, and in *Seager v. Burns* (*supra*), judgment-creditors of the vendors, whose judgments had been recovered subsequent to the contract, were held to be proper defendants in a suit by the vendee for the purpose of cutting off their liens; while in *Agard v. Valencia* (*supra*), where the land contracted to be sold was an undivided share of a tract, it was held that all persons subject to the vendee's equities and holding adversely to him, must be made parties defendant.

(2) *Owen v. Frink*, 24 Cal. 171, 177; and see *Paterson v. Long*, 5 Beav. 186. In *Wood v. Perry*, 1 Barb. 114, several persons in possession of distinct parcels of a tract as purchasers, united as plaintiffs to enforce a contract by which the vendor had agreed to convey the whole tract to A., and which contract A. had assigned to one of the plaintiffs for the benefit of all; *held*, that the plaintiffs could not thus unite and maintain the action.

(3) *Nelthorpe v. Holgate*, 1 Coll. 203.

as co-plaintiffs in the suit on the first contract against B.(1) When a purchase is made by A. in his own name, but it is in fact a joint purchase by A. and B., B. can sue A. to compel a conveyance of his own share, although the agreement to make the purchase jointly was verbal.(2) A county, to which land had been dedicated on certain conditions, may sue to compel a specific performance of the dedication.(3) A tenant for life and contingent remainderman may unite as co-plaintiffs.(4)

SEC. 485. Generally all persons claiming under the original parties, when there are no intervening equities to hinder, may be parties to the suit.(5) But a person who was not a party to the contract, nor privy to it, nor one for whose benefit it was made, cannot, in general, sue to compel its enforcement.(6) A vendee who has assigned all his interest in the contract, need not be joined as a co-plaintiff in a suit by the assigned.(7) General creditors of the vendee or of the vendor before judgment obtained, cannot sue to enforce the contract, and are not proper parties.(8) Where a contract has been made by a trustee for the benefit of another person, and this beneficiary sues for a specific performance, the trustee must also be joined as a party.(9) But in suits, either by or against trustees, the *cestuis que trustent* are not, in general, either necessary or proper parties.(10) And in a suit by a *cestui que trust* against the trustee to compel a conveyance to another person, to secure whose claim against the *cestui que trust* the title was held by the trustee, was declared not to be a necessary plaintiff nor defendant.(11)

SEC. 486. *Person for whose benefit the contract is made.*—The doctrine is well settled in England that a stranger to the contract, although he takes a benefit under it, cannot in general sue upon it.(12) To this

(1) B— v. Walford, 4 Russ. 372. But a sub-purchaser from the vendee is not in England a proper co-plaintiff in the vendee's suit, *ibid*; Cutts v. Thodey, 1 Coll. 223.

(2) Levy v. Brush, 8 Abb. Pr. (N. S.) 418.

(3) Reese v. Lee Co., 49 Miss. 639.

(4) Sohler v. Williams, 1 Curtis, 479.

(5) Hays v. Hall, 4 Port. (Ala.) 374; McMorris v. Crawford, 15 Ala. 271.

(6) Beardsley Scythe Co. v. Foster, 36 N. Y. 561.

(7) Miller v. Whittier, 32 Me. 203; Colerick v. Hooper, 3 Ind. 316; Currier v. Howard, 14 Gray, 571.

(8) Griffith v. Frederick Co. Bank, 6 Gill & J. 424.

(9) Cope v. Parry, 2 J. & W. 538.

(10) Story's Eq. Pl. § 209, and cases cited in 8th ed.

(11) Smith v. Sheldon, 65 Ill. 219; 44 Ill. 65.

(12) Moss v. Bainbrigge, 18 Beav. 478; 6 De G. M. & G. 292; Colyear v. Countess of Mulgrave, 2 Keen, 98; Hill v. Gomme, 5 My. & Cr. 250, 256; Crow v. Rogers, 1 Str. 592; Ex parte Peele, 6 Ves. 602.

doctrine there are two exceptions. The first is the case of issue and collateral relatives who are benefited by marriage settlements, and who are entitled to compel their specific performance, although not parties to the contract.(1) The second exception includes cases where the nearness of relationship of a party to the contract with the person to be benefited by it gives to the latter a right to sue on the contract; as where a promise is made to a father to pay money or to convey land to his child, the child can sue either at law or in equity on the agreement.(2) The rule, as thus settled in England, cannot be said to prevail in many of the American states. It has been laid down in general terms that the person for whose benefit a contract is made, although not a party to the agreement, may sue in his own name to enforce a specific performance.(3) It is now the settled doctrine in so many of the states, that it may properly be called the American doctrine, that where a promise is made by A. to B., upon a consideration moving from B., whereby the promissor engages to do something for the benefit of C., although C. is both a stranger to the consideration and not an immediate party to the contract, yet he may maintain an action upon the contract, in his own name, against the promissor. Many of the cases in which this rule has been applied were legal actions, but there is no reason why the rule should not be extended to the equitable action for a specific performance, especially in those states which have abolished the distinction between legal and equitable proceedings.(4)

(1) The rule is familiar with respect to the issue, *Hill v. Gomme*, 5 My. & Cr. 254, per Lord COLTENHAN; and is now settled with regard to collaterals. *Goring v. Nash*, 3 Atk. 186; *Davenport v. Bishop*, 1 Y. & C. Ch. 451; 1 Phil. 698; *Edwards v. Countess of Warwick*, 2 P. Wms. 171; *Vernon v. Vernon*, 2 P. Wms. 594; 1 Bro. P. C. 267; *Stephens v. Trueman*, 1 Ves. Sen. 73; *Pulvertoft v. Pulvertoft*, 18 Ves. 84, 92; *Campbell v. Ingilby*, 21 Beav. 567.

(2) *The Physician's Case*, cited in 1 Vent. 6; *Dutton v. Pool*, 1 Vent. 318, 332.

(3) *Van Dyne v. Vreeland*, 3 Stockt. Eq. 370. Where a father entered into a contract for the purchase of land for the benefit of his infant child—that is, the conveyance was to be made to the child—the child was held entitled to sue in his own name for an enforcement of the contract.

(4) *Kimball v. Noyes*, 17 Wisc. 695; *McDowell v. Law*, 35 Wisc. 171; *Sanders v. Clason*, 13 Minn. 379; *Jordan v. White*, 20 Minn. 91; *Myer v. Lowell*, 44 Mo. 328; *Rogers v. Gosnell*, 58 Mo. 589, 590; 51 Mo. 466; *Cross v. Truesdale*, 28 Ind. 44; *Devol v. McIntosh*, 23 Ind. 529; *Day v. Patterson*, 18 Ind. 114; *Rice v. Savery*, 22 Iowa, 470; *Scott v. Gill*, 19 Iowa, 187; *Johnson v. Knapp*, 36 Iowa, 616; *Allen v. Thomas*, 3 Metc. (Ky.) 198; *Wiggins v. McDonald*, 18 Cal. 126; *Miller v. Florer*, 15 Ohio St. 148; *Coster v. Mayor, etc.*, 43 N. Y. 399, 411; *Van Schaick v. Third Av. R. R.*, 38 N. Y. 346; *Ricard v. Sanderson*, 41 N. Y. 179; *Barker v. Bradley*, 42 N. Y. 316, 319; *Secord v. Lord*, 3 Keyes, 525; *Clafin v. Ostrom*, 54 N. Y. 581, 584; *Cooley v. Howe Machine Co.*, 53 N. Y. 620; *Glen v.*

SEC. 487. *Where the vendee has assigned the contract.*—Unless the contract is one which calls for personal services, or is one which in any manner depends upon the learning, skill, solvency, or other personal quality of the party, or is fiduciary in its nature, it may be assigned by the vendee or party who stands in the position analogous to that of the vendee. This class of assignable agreements includes all ordinary contracts for the sale or leasing of land or personal property. The assignee may then sue in his own name to compel a specific performance of the contract.(1) In England the assignor is also joined as a party plaintiff or defendant;(2) this rule is followed in some of the American cases, and it is certainly proper to add the assignor as a party, so that all questions as to the validity of the assignment may be conclusively settled;(3) but in other American decisions it is held that the assignor is not a necessary party when the assignment is complete and absolute.(4) The purchaser of the vendee's interest at a judicial sale on a decree against the vendee may sue in his own name, and this principle would include the assignee in bankruptcy or insolvency, if the contract is itself assignable.(5) While the assignee of the vendee may thus sue the vendor to enforce a specific performance, the vendor cannot, upon a mere assignment, maintain a suit against the assignee; his remedy is against the original vendee alone, unless in the change of parties the whole transaction amounts to a novation.(6) In the foregoing rules it is assumed that the vendee's entire interest has been assigned; when the assignment is only of a partial interest

Hope Life Ins. Co., 56 N. Y. 379, 381; Barlow v. Meyers, 6 T. & C. 183; 64 N. Y. 41; Arnold v. Nichols, 64 N. Y. 117; Lawrence v. Fox, 20 N. Y. 268; Burr v. Beers, 24 N. Y. 178; Thorp v. Keokuk Coal Co., 48 N. Y. 253; Garnsey v. Rogers, 47 N. Y. 233, 240; Merrill v. Green, 55 N. Y. 270, 273; Turk v. Ridge, 41 N. Y. 201, 206; Phillips v. Van Schaick, 37 Iowa, 229.

(1) Duke v. Mayor of Exon, 2 Freem. 183; Vandenanker v. Desbrough, 2 Vern. 96; Moyses v. Little, 2 Vern. 194; Crosbie v. Tooke, 1 My. & K. 431; Morgan v. Rhodes, 1 My. & K. 485; Fellowes v. Lord Gwydyr, 1 R. & My. 83; Maughlin v. Perry, 35 Md. 352; Owen v. Frink, 24 Cal. 171; Corbus v. Teed, 69 Ill. 205; Perkins v. Hadsell, 50 Ill. 216; Fitzhugh v. Smith, 62 Ill. 486; Evans v. Gordon, 69 N. H. 444; House v. Dexter, 9 Mich. 246; Gaston v. Plum, 14 Conn. 344.

(2) See English cases in last note.

(3) Allison v. Schelling, 27 Tex. 450.

(4) Currier v. Howard, 14 Gray 571; Miller v. Whittier, 32 Me. 203; Colerick v. Hooper, 3 Ind. 316.

(5) Fitzhugh v. Smith, 62 Ill. 486. In Bogan v. Camp, 30 Ala. 276, it was held that where a distributee assigns his interest in the undivided assets of an estate in the hands of the administrator, and the assignee sues to compel a specific performance, all the distributees are necessary parties defendant.

(6) Corbus v. Teed, 69 Ill. 205.

in the contract, the suit must be by the vendee, and the assignee is not a necessary party.(1)

SEC. 488 *Where the vendee has died.*—When the vendee dies before completion, unless the contract is strictly personal in its nature, so that the obligation is ended by the death, the suit for a specific performance must be brought by his heirs if he dies intestate, or by his devisee if his interest under the contract has been devised. This follows as a necessary consequence of the doctrine that an equitable estate in the land vests in the vendee, which passes by descent or devise, and the heirs or devisee, and not the personal representatives, are entitled to the conveyance.(2) Whether the administrator or executor of the deceased vendee must be joined as a party, will depend upon circumstances. If the purchase-money has been fully paid before the vendee's death, his personal representatives have no real interest in the suit, and need not be joined;(3) but if the purchase-price has not been paid, and the personal estate of the deceased vendee is liable for its payment, it would seem that his executors or administrators are necessary parties with the heirs or devisees, as defendants if not as co-plaintiffs, for in such case they as representatives of the vendee are the debtors, and the decree must, of course, order a payment as a condition precedent to a conveyance being made to the heir or devisee.(4) If the suit is not brought for a specific performance, but for damages, then the personal representatives of the deceased vendee should be the plaintiffs.(5)

(1) *Willard v. Tayloe*, 8 Wall. 557.

(2) *Buckmaster v. Harrop*, 7 Ves. 341; 13 Ves. 456; *Townsend v. Chapernowne*, 9 Price, 130; *Webster v. Tibbitts*, 19 Wisc. 438; *Peters v. Jones*, 35 Iowa, 512, 518; *Buck v. Buck*, 11 Paige, 170 (devisees); *Speir v. Robinson*, 9 How. Pr. 315; *House v. Dexter*, 9 Mich. 246; *Callihan v. Hall*, 4 W. Va. 531; *Downing v. Risley*, 2 McCarter, 93; *Lord v. Underdunk*, 1 Sandf. Ch. 46; In *House v. Dexter* (*supra*), it was held that where the vendee had assigned, and the assignee died, his heirs and not his administrator should sue. See Story's Eq. Pl. §§ 160-163, 177.

(3) See cases in last note. In *Speir v. Robinson* (*supra*), which was a suit by a devisee of the vendee, it was held that the heirs of the vendee should not join as co-plaintiffs, nor as co-defendants, unless the will was disputed, and that the vendee's executors or administrators should not be united with the devisee as plaintiffs. In *Lord v. Underdunk* (*supra*), the vendee had paid in full and then died, and his heirs had conveyed to the plaintiffs who sued the vendor; the vendee's heirs were held necessary parties.

(4) See cases in last note but one; *Downing v. Risley*, 2 McCarter, 93.

(5) *Webster v. Tibbitts*, 19 Wisc. 438; *Peters v. Jones*, 25 Iowa, 512, 518. In those states where the widow of the vendee is entitled to dower in the vendee's equitable estate acquired under the contract, so that she would be entitled to dower in the land when the legal title thereto was conveyed to the heirs, it would seem that she is a necessary party to the suit brought by the vendee's heirs.



SEC. 489. *II. Where the suit is on behalf of the vendor.*—In all ordinary cases, it is plain that the vendor is the only necessary, or even proper party plaintiff. In those states where a wife is only entitled to dower in lands of which her husband is seized at the time of his death, so that her dower right is cut off by his conveyance, it would seem that the wife of the vendor should be joined as a party, so that she may be bound by the decree ordering a conveyance to be made by her husband. But in those states where the common-law doctrine as to dower prevails, so that her right is not affected by her husband's conveyance, there seems to be no necessity for the wife of the vendor to be joined—unless she is an actual party to the contract—since her interest could not be affected by the decree. Where the vendor has before completion conveyed the land subject to the contract, and the grantee thereof sues for a specific performance, it would seem, on the general principles of equity procedure, that the vendor himself should be joined as a party to the suit.(1) Where land has been sold at public sale by order of a court, and the purchaser refuses to complete, the officer making the sale is the only necessary party plaintiff in the suit for a specific performance, although it seems that the persons interested in the subject-matter may join in the suit.(2) Where a husband and wife had jointly agreed to convey, and had executed a deed, and deposited in the hands of a third person to be delivered to the vendee on his payment of the price, it was held that they might unite as plaintiffs in a suit against the vendee to compel a performance by him.(3)

SEC. 490. *Where the vendor has died.*—On the death of the vendor before completion, the suit for a specific performance must be brought by his executors or administrators as the necessary plaintiffs, since by the doctrine of equitable conversion the vendor's interest under the contract is regarded as personalty, and they are entitled to receive the purchase-money; but the vendor's heirs, or devisees, in case he has devised the land in question, must also be joined as parties, since the legal title is vested in them and they must make the conveyance, and they cannot be bound by the decree unless parties to the suit.(4)

(1) See *Daily v. Litchfield*, 10 Mich. 29

(2) *Brown v. Ritter*, 26 N. J. Eq. 456.

(3) *Farley v. Palmer*, 20 Ohio St. 223.

(4) *Baden v. Countess of Pembroke*, 2 Vern. 212; *Roberts v. Marchant*, 1 Hare, 547; 1 Phil. 370; *Galton v. Emuss*, 1 Coll. 243; *Mitchell v. Shell*, 49 Miss. 118; *Thompson v. Smith*, 63 N. Y. 301; *McCarty v. Meyers*, 5 Hun. 83; *Story's Eq. Plead.* §§ 160, 163, 177. In Texas the heirs of the vendor need not be made parties in a suit by his administrator; they are bound by the decree. *Shannon v. Taylor*, 16 Tex. 413.

SEC. 491. *Second. The parties defendant. I. Where the suit is against the vendor.*—The general rule has already been stated, that under ordinary circumstances the vendor himself is the only necessary or even proper defendant. I shall give some instances in which this general rule has been followed, departed from or modified, and shall then examine the two important cases where the vendor has assigned, and where he has died. The wife of the vendor who has not joined in the contract cannot be made a defendant.(1) It is held in California that all persons subject to the vendee's equities and holding adversely to him must be joined as defendants;(2) and in Minnesota, that judgment-creditors of the vendor, whose judgments were recovered subsequent to the contract, may properly be joined as defendants.(3) Under the doctrine as generally accepted, however, incumbrancers on the land, whether prior or subsequent to the contract, and whether mortgagees or judgment-creditors, are not proper defendants in a suit against the vendor.(4) And when in the contract of sale the vendor had named an agent to execute and deliver a deed in the vendor's name, and had directed this agent to perform, which he had neglected to do, a suit against the vendor and the agent as co-defendants was held as improperly brought, since the agent had no interest, and was not a proper party in any aspect of the case.(5) Land had been sold at execution sale, and afterwards redeemed in alleged pursuance of the statute; the purchaser denying the validity of the redemption, brought an action against the sheriff alone to compel the execution and delivery of a deed; it was held that the person claiming the land under the redemption was a necessary party defendant.(6)

SEC. 492. In general, when the vendor is a trustee, his *cestuis que trustent* need not be joined as co-defendants. In a suit by a *cestui que trust* against the trustee to compel a conveyance, another person, to secure whose claim against the plaintiff the title was taken and held by the trustee, is not a necessary defendant.(7) In a suit to enforce a contract made under a deed of trust to sell the land, the grantor in the deed is a necessary defendant;(8) and in a suit against a corpora-

(1) *Richmond v. Robinson*, 12 Mich. 193

(2) *Agard v. Valencia*, 39 Cal. 292.

(3) *Seager v. Burns*, 4 Minn. 141, 145.

(4) *Chapman v. West*, 17 N. Y. 125; *Secombe v. Steele*, 20 How. 94.

(5) *Dahoney v. Hall*, 20 Ind. 264; and see *Roby v. Cossitt*, 78 Ill. 638.

(6) *Crosby v. Davis*, 9 Iowa, 98.

(7) *Smith v. Sheldon*, 65 Ill. 219; 44 Ill. 68. As to the necessity of uniting the *cestuis que trustent*, see *Story's Eq. Pl.* § 209.

(8) *White v. Watkins*, 23 Mo. 423.

tion as vendor, a trustee holding the legal title to the corporation lands must be joined as a defendant.(1) A number of other particular instances are collected in the foot-note.(2)

SEC. 493. *Where the vendor has assigned.*—All persons having or claiming an interest in the land derived from the vendor after the contract and with notice thereof, are necessary defendants in a suit brought by the vendee or his representatives.(3) If the vendor, subsequent to the contract, conveys or contracts to convey the subject-matter to a person who has notice of the original contract, such grantee or second vendee is bound, as has been already shown, to perform, and is, of course, a necessary party defendant.(4)

SEC. 494. *Where the vendor died.*—If the vendor dies before the completion, the suit must be brought against his heirs, or against his devisees, if the land in question has been devised, and where the heirs

(1) *Morrow v. Lawrence*, 7 Wisc. 574.

(2) Where the vendee's rights came by divers assignments to the plaintiff, all the persons through whom he thus derived title were held to be necessary defendants. *Allison v. Shilling*, 27 Tex. 450; *per contra*, the vendee need not be joined in a suit by his assignee. *Carrier v. Howard*, 14 Gray, 511. In a suit to compel the execution of securities on certain lands, contracted to be given to secure a loan, prior mortgagees of the same land are necessary defendants. *Caldwell v. Taggart*, 4 Pet. 190. Where the vendee had died and his heirs conveyed their interest to the plaintiffs who sue the vendor, the heirs were held necessary parties. *Lord v. Underdunk*, 1 Sandf. Ch. 46

(3) *Morris v. Hoyt*, 11 Mich. 9; *Seager v. Burns*, 4 Minn. 141; *Stone v. Buckner*, 12 Sm. & Mar. 73.

(4) *Saunders v. Cramer*, 3 Dr. & W. 99; *Taylor v. Stibbert*, 2 Ves. 437; *Howard v. Hopkins*, 2 Atk. 371; *Brooke v. Hewitt*, 3 Ves. 253; *Knolleys v. Alcock*, 5 Ves. 648; *Spence v. Hogg*, 1 Coll. 225; *Dowell v. Dew*, 1 You. & C. Ch. 345; *Crofton v. Ormsby*, 2 Sch. & Lef. 583; *Potter v. Saunders*, 6 Hare, 1; *Hersey v. Giblett*, 18 Beav. 174; *Shaw v. Thackeray*, 1 Sm. & G. 537; *Goodwin v. Fielding*, 4 De G. M. & G. 90; *Fullerton v. McCurdy*, 4 Lans. 132; *Daily v. Litchfield*, 10 Mich. 29; *Stone v. Buckner*, 12 Sm. & Mar. 73; *Bryant v. Booze*, 55 Geo. 438; *Hildreth v. Shelton*, 46 Cal. 382; and see cases cited (*ante*) under §§ 463-467. An assignee in bankruptcy of a vendor who had not received the entire purchase-money is a necessary co-defendant, since he is entitled to the money due. *Swepton v. Rouse*, 65 N. C. 34; and a third person who holds a deed executed by the vendor as an escrow, and who refuses to deliver it to the vendee, is a proper co-defendant. *Davis v. Henry*, 4 W. Va. 571. In *Downing v. Risley*, 2 McCarter, 93, a suit was brought by heirs of a deceased vendee against a grantee with notice of the vendor, and it was held that the administrator of the vendee was also a necessary defendant where the estate of the vendee was unsettled, his debts unpaid, and the amount of the assets small. In *Powell v. Young*, 45 Md. 414, a third person who had conspired with the vendor to prevent a completion of the contract, and had aided him in preventing such completion, was held a proper co-defendant, and to be liable with the vendor for compensation.

are sued all of them should be joined.(1) If the suit is against a devisee of the land in question, it does not seem to be necessary to join the heirs, unless the will is disputed. If the purchase-money remains unpaid in whole or in part, the personal representatives of the vendor are also necessary co-defendants, and they are always proper parties.(2) This rule applies as well to infant as to adult heirs. They should be made defendants, and the decree will be enforced against them after they arrive at age, or by virtue of statutory provisions during their infancy.(3)

(1) *Morgan v. Morgan*, 2 Wheat. 290; *Moore v. Murrah*, 40 Ala. 573; *Jacobs v. Locke*, 2 Ired. Eq. 286; *Craig v. Johnson*, 3 J. J. Marsh. 572 (devisees); *Newton v. Swazey*, 8 N. H. 9; 9 N. H. 385; *House v. Dexter*, 9 Mich. 246; *Duncan v. Wickliffe*, 4 Scam. 452; *Traphagen v. Traphagen*, 40 Barb. 537. When the suit is thus brought against the heirs, those who have already conveyed need not be joined, the reason upon the omission being stated in the pleading. *Barnard v. Macy*, 11 Ind. 536.

(2) *Potter v. Ellice*, 48 N. Y. 321, 323; *Judd v. Mosely*, 30 Iowa, 423, 427; *Story's Eq. Plead.* §§ 160, 166, 167; and see *Thompson v. Smith*, 63 N. Y. 301. In *Potter v. Ellice* (*supra*), HUNT, C. J., said: "It is difficult to say that this action is well brought, the administrators of Ellice (the vendor), not being made parties defendant. The heir of Mr. E. holds the legal title in trust to convey the same to the vendee upon performance of conditions of the contract. He is a mere instrument, having no real interest in the matter in a case where the contract is performed. The administrators are the real parties in interest. Both by the statute and the common law the interest in the contract passes to them. They are the parties to whom the money is to be paid, and who have the entire beneficial interest in the contract. Their discharge or receipt is a necessary muniment to the vendee. They are the parties who not only receive, but who are to settle, or contest, as the case may be, the amount to be paid by the vendee in fulfillment of his contract." A statute of Iowa provides that the suit may be brought against the executor or administrator of a deceased vendor, and that other parties are not necessary, but may be brought in at the discretion of the court. In *Judd v. Mosely* (*supra*), the action was by the vendee against the heirs alone. The court held that the personal representatives are not necessary but only proper parties; that in the absence of the statute the heirs are the only proper parties; and that the statute was only permissive, and did not make the administrators or executors necessary defendants. The court made no allusion to the question discussed in *Potter v. Ellice*—the payment of the price—and the report does not show whether it had been paid or not. If the purchase-money has been paid in full, either to the vendor during his life, or to his administrators after his death, then the heirs would seem to be, in general, the only necessary defendants. But the personal representatives are always eminently proper parties defendant to meet any possible question as to payment, and to be concluded by the decree, and by the English rule they seem always to be joined. See English cases cited (*ante*) under § 489. In Texas the suit is brought against the administrator alone; the heirs need not be joined, for they are bound by the decree. This results from the fact that the administrator succeeds to the real as well as to the personal estate of the deceased. *Shannon v. Taylor*, 16 Tex. 413.

(3) *Hill v. Ressegieu*, 17 Barb. 162; *Sutphen v. Fowler*, 9 Paige, 280; *Forman v. Stickney*, 77 Ill. 575. In *Sutphen v. Fowler*, the infant heir was decreed to con-

SEC. 495. *II. Where the suit is against the vendee.*—In all ordinary cases the rule is clear that the vendee himself, or his representatives, are the only proper defendants. It has already been shown that when the vendee assigns the contract, a suit cannot be maintained by the vendor against the assignee, since a liability arising out of contract cannot, except in a few special instances,(1) be transferred by mere assignment.(2) A third person may assume the liability by a novation, but this requires a new and distinct contract substituted for the original one. If the vendee entered into the contract as a trustee, or paid the purchase-price out of trust funds, the *cestuis que trustent* are not necessary defendants.(3) Where a vendee assigned to a trustee for the benefit of his creditors, and there were conflicting claims concerning the land between the vendee, his wife, and the assignee, it was held that the vendor could make all these parties defendants, and thus settle all the questions in one suit; but that the *cestuis que trustent* under the assignment were not proper parties.(4) Where the plaintiff in a suit against the vendee claimed the land under a contract to convey, made by the vendor, the vendor, or, in case of his death, his legal representatives were held to be necessary defendants.(5)

SEC. 496. *Where the vendee has died.*—If the vendee dies before completion, and the vendor sues for a specific performance, the personal representatives of the deceased are the primary defendants, since they are liable for the price, and must pay the money; but the heirs of the vendee, or his devisees if he has devised his interest, are also necessary co-defendants, since the conveyance must be made to them.(6) When both the vendor and the vendee die before completion, the parties to the suit will be determined by a combination of the rules already given in relation to the death of each. In general the

vey when he came of age, and in the meantime the vendee was put and protected in possession. In *Swartout v. Burr*, 1 Pa. St. 495, which was against an insane heir of the vendor, the decree ordered a conveyance to be made by his committee.

(1) For example, in covenants running with the lands.

(2) *Corbus v. Teed*, 69 Ill. 205.

(3) *Gibbs v. Blackwell*, 37 Ill. 191; *Story's Eq. Pl.* § 209.

(4) *Hanchett v. McQueen*, 32 Mich. 22.

(5) *Daily v. Lichfield*, 10 Mich. 29.

(6) *Champion v. Browne*, 6 Johns. Ch. 402; *Townsend v. Champernowne*, 9 Price, 130; *Story's Eq. Pl.* §§ 160, 177. If the vendor sues the heirs alone of the deceased vendee, the latter can insist upon the administrator also being made a defendant, since he is answerable for the price. *Cock v. Evans*, 9 Yerg. 287; *Story's Eq. Pl.* § 177.

heirs or devisees and the personal representatives of both the deceased parties to the contract will be proper if not necessary parties to the suit.(1)

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## SECTION II.

### *Special statutory provisions.*

SECTION 497. In most of the states the statutes expressly provide for the case where the vendor dies before completing the contract, and leaves heirs or devisees adult or infant; and, in many instances, for the case where the vendor before completion becomes insane. This legislation is of different types; in some states it deals entirely with the suit in equity for a specific performance; in others it provides for a more summary special proceeding by which the contract may be enforced without suit, as a step in the settlement of the deceased vendor's estate. By the common form of this special proceeding, where a vendor who had entered into a written contract, dies before completing the contract, and the party entitled to a conveyance has paid or is ready to pay the purchase-price, the probate court which has control of the administration may authorize or order the administrator or executor of the decedent to make the conveyance which the vendor himself should have made had he been alive; and the conveyance so made is declared to have the same force and effect as though it had been executed by the vendor himself. The application is made by the vendee, or his heirs, or assigns, or other party entitled to a conveyance, by filing a petition in the probate court; notice is required to be given to all persons interested; the necessary proofs are made at the hearing; and the court thereupon, in some states grants a license for the administrator or executor to execute a deed;

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(1) In *Peters v. Jones*, 35 Iowa, 512, 513, the heirs and widow of the deceased vendee brought a suit against the devisees of the vendor to whom the land had been devised, and the parties were held to be proper. See cases cited by MILLER, J., at p. 518. In *Anshutz's Appeal*, 34 Pa. St. 375, both vendor and vendee had died, and a proceeding to enforce the contract was brought in the probate court by the administrator of the vendor; it was held that the heirs and administrator of the vendee and all persons deriving title under them were necessary defendants, and that the heirs of the vendor should have notice. Although this proceeding was special and statutory, the question as to parties was determined by the equitable doctrines applicable to the more formal suit in equity for a specific performance.

in others makes an order or decree to the same effect, or else dismisses the petition. In several states the application may be made, and the petition for an order or license may be filed, by the administrator or executor of the deceased.<sup>(1)</sup> The peculiarity of this legislation is that it renders the deed of the administrator or executor valid and sufficient to pass the complete title, and thus obviates the necessity of a decree against and conveyance from the heirs or devisees whether infant or adult. The proceeding is suited to cases of ordinary contracts where there is no real controversy as to the obligations of the respective parties, and especially where there is no dispute concerning the time of performance, or the ability of the vendor to perform and

(1) This form of special proceedings established by statutes of the following states among others: Maine, R. S. of 1871, p. 551, §§ 16, 17. On application of the vendee, etc., the probate court may authorize the executor or administrator of deceased vendor, or, where there is none, the guardian of the heirs of the deceased, to execute the deed; New Hampshire, Gen. Stat. 1867, p. 373, § 10; Vermont, Gen. Stat. 1870, p. 375, §§ 42, 43, and same provision as to guardian of insane vendor, p. 442, § 39; Massachusetts, Gen. Stat. 1860, p. 575, §§ 5, 6, applies to administrator, etc., of deceased vendor, and to guardian of insane vendor; Connecticut, Gen. Stat. 1875, p. 57, § 29; New Jersey, Revision, 1877, p. 782, §§ 132, 133. The executor or administrator of the deceased vendor, or the vendee or person entitled to a conveyance may apply by petition to the orphan's court, and on due notice, proofs, and hearing, if the case is a proper one, the court may decree the administrator or executor to convey. Michigan, Comp. Laws, 1871, Vol. 2, pp. 1419-1421, §§ 1-5. Application is to be made by the vendee or other person entitled to a conveyance. If the petition is dismissed, it may be without prejudice to the right of the petitioner to file a bill in equity; Illinois, R. S. 1874, p. 270, §§ 2-5. The provisions apply to executors and administrators of deceased vendors, and to conservators of insane vendors. Application may be made either by the party entitled to a conveyance, or by the administrator, executor, or conservator of the vendor; Minnesota, Stat. at Large, 1873, Vol. 1, p. 687, §§ 244-247. Application is to be made by person entitled to a conveyance; Mississippi, Rev. Code, 1871, p. 237, § 1195, on petition by the vendee, etc.; Missouri, R. S. 1870 (by Wagner), p. 99, § 38, on petition of the person entitled to a specific performance; Kansas, R. S. 1876, §§ 2048-2054. The party wishing a specific performance may file a petition to the probate court which may order the executor or administrator to perform such contract, specifically saving to infants, persons of unsound mind, and persons absent from the United States, the time of two years after their disabilities are removed, to appear and file their petition to set aside such order; California, Code of Civil Procedure (1878), §§ 1597-1607. Person entitled to a conveyance may apply to the probate court by petition, and after due notice and hearing, court may order the executor or administrator of deceased vendor to convey, or may dismiss proceeding without prejudice to a suit in equity; Dakota, Rev. Codes, 1877, p. 682, §§ 221-231, same as in California; Nevada, Comp. Laws, 1873, Vol. 1, p. 175, §§ 687-696, same as in California; Idaho, Rev. Laws, 1875, p. 281, §§ 205-214, same as in California; Arizona, Comp. Laws, 1871, p. 279, §§ 205-214, ditto; Wyoming, Comp. Laws 1876, p. 328, §§ 143-148. Similar to statute of Kansas, (*supra*)

to give a good title. Another form of the special proceeding provides for the appointment of a special officer or commissioner to execute the deed where the vendor has died, so as to pass his estate and bind his heirs or devisees.(1) A third form of the special proceeding provides for an order made directly against infant heirs of a deceased vendor, authorizing and directing them to perform the contract by executing a deed.(2)

SEC. 498. In several of the states the statutes, instead of creating a special proceeding, and sometimes in addition to the provisions authorizing such proceeding, relate entirely to the ordinary suit in equity for a specific performance, modifying to some extent the equity rules concerning parties where the vendor has died. The usual form of these statutory regulations permits the suit to be brought against the executor or administrator of the deceased vendor, instead of his heirs or devisees, and makes the deed executed by such executor or administrator in performance of the contract, as effectual as though it had been given by the vendor himself.(3) In a very few states the

(1) Indiana, Revision of 1876, Vol. 2, p. 237, §§ 1-4. The executor or administrator of the deceased vendor may file a petition against the vendee, etc., and against the heirs or devisees of the vendor, and after the proper notice and hearing the court may appoint a commissioner to execute a deed according to the terms of the contract, which deed shall be approved by the court and then delivered. The executor or administrator may tender such deed to the vendee, etc., and demand the payment of the unpaid purchase-money, and these, in case of refusal, may maintain an action therefor.

(2) New York, R. S. vol. 2, p. 194, § 169 *et seq.* The supreme court or county court has power to compel a specific performance by an infant heir or other person of a contract to convey land made by any party who may die before performing, on the petition of the executor or administrator of the deceased, or of any person interested, and on a hearing of all the parties concerned. This proceeding is summary and not by action; Wisconsin, R. S. 1871 (Taylor's ed.), chap. xcvi, § 3. Circuit court may compel a specific performance by any infant heir or other person, of any contract made by a deceased vendor, on petition of his executor or administrator, or of any person interested. This proceeding is substantially the same as that in New York.

(3) Maine, R. S. 1871, pp. 787, 788, §§ 6-10. In an equity suit the court may require the executor or administrator to convey the same estate that the deceased ought to have done; or if any heirs or devisees are within the state and competent to act, the court may direct them to be joined; if defendant neglects to convey, plaintiff may have judgment for possession according to the terms of the contract, and process to put him in possession, and may hold possession as though the land had been conveyed. If the vendee does not sue, and the heirs of vendor are infants, or otherwise incapacitated, the executor or administrator of deceased vendor may bring the suit in equity. Michigan, Comp. Laws, 1871, vol. 2, p. 1419-1422, § 9. The suit and decree may be against the executor or administrator of deceased vendor, or the heirs or devisees may be joined. Iowa, Code of 1873,



legislation is broader in its compass, and extends to the entire suit in equity, or to many of its important features.(1)

p. 426, §§ 2487, 2488. The suit may be against the executors or administrators of vendor, and they may be compelled to convey; other defendants are not necessary, but may be joined. Tennessee Statutes, 1871, vol. 1, p. 943, § 2025. When the vendor dies his personal representative may execute the deed to the person entitled; § 2027, if there are several such representatives, the deed of either one is effectual. The court has held that the personal representatives may be compelled by a suit in equity to convey. See *Hale v. Darter*, 5 Humph. 79; *Bartlett v. Watson*, 5 Sneed, 288; Nebraska Gen. Stat. 1873, p. 341, § 329.

(1) In these states the important rules concerning the suit are reduced to a statutory form, and modified in some particulars. Georgia, Code 1873, pp. 543, 544, §§ 3186-3192. Among other changes, full payment of purchase-price is a sufficient part performance of a verbal contract; California, Civil Code (ed. of 1878), §§ 3384-3395; Dakota, Rev. Codes, 1877, p. 492, §§ 1994-2003.



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